TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 90.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

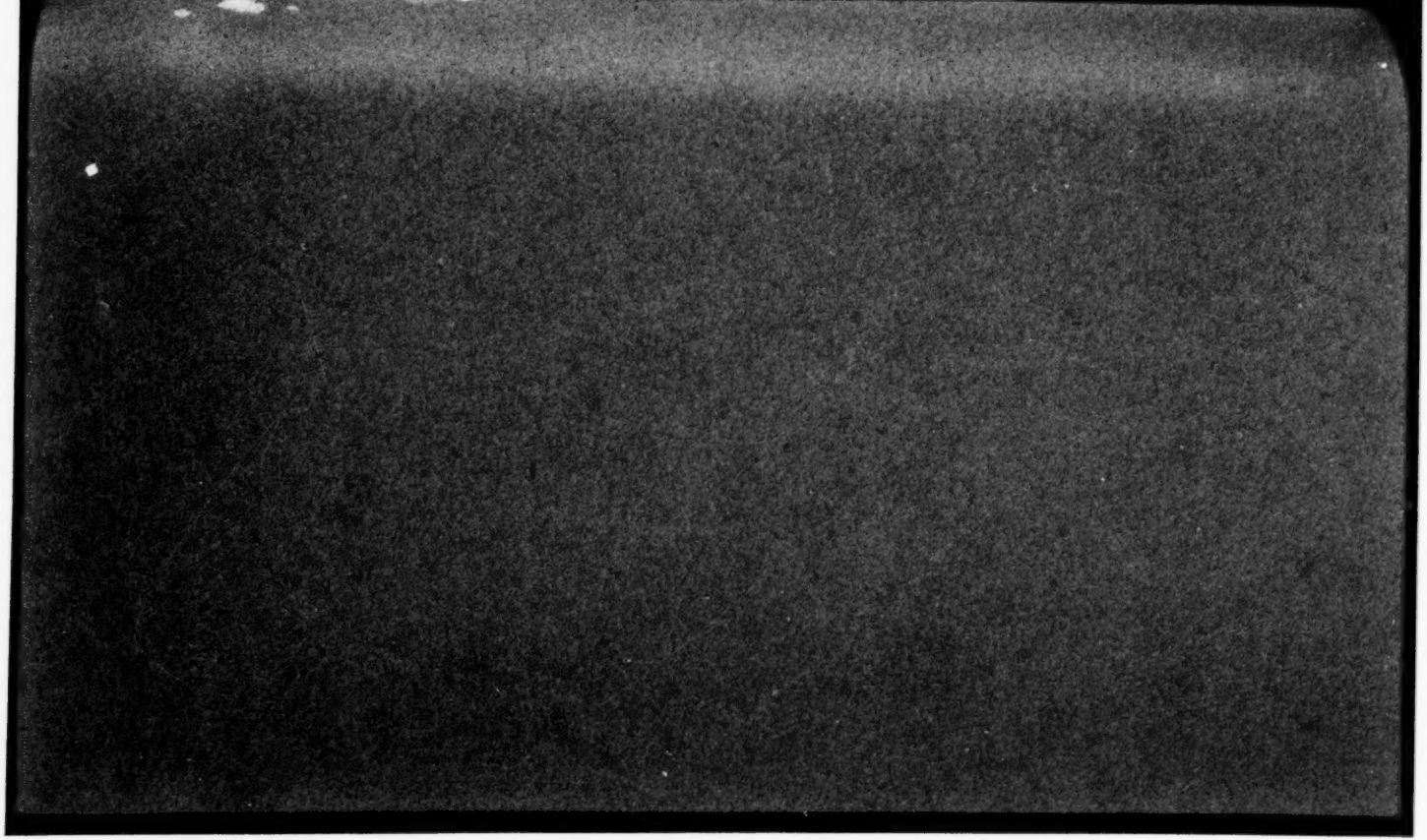
vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED JULY 23, 1908.

(19,019.)



(19,019.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 368.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1903.

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1 In the United States Circuit Court of Appeals, Third Circuit, March Term, 1903.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, a Citizen of the State of New York, Complainant in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, a Citizen of the State of Pennsylvania, Defendant in Error.
} No. —.

Among the rolls, records and judicial proceedings in the circuit court of the United States for the western district of Pennsylvania, at No. 18 May term, 1902, may be found the following words and figures, to-wit:

Docket Entries.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation Citizen of the State of New York,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation Citizen of the State of Pennsylvania.

2 Plaintiff's petition for the approval and filing of its bond tendered therewith in the sum of one hundred thousand dollars ($100,000.00) for the use and benefit of the defendant in its own behalf and as the owner, lessee and operator of the railroad over whose properties the rights of way sought to be appropriated by the plaintiff extend, and for the issuance of such process or for such proceeding as may be agreeable to principles and usages of law, filed January 15th, 1903. *Ex-parte* affidavit of Harry D. Easton attached and exhibits filed. 1902, November 20th, argument had on plaintiff's petition. C. A. V. 1903, January 15th, opinion filed granting order dismissing the petition to continue. See May term, 1903, equity. And now, January 20th, 1903, this case having come on for hearing our petition of the Western Union Telegraph Company for the approval and filing of its bond to the Pennsylvania Railroad Company, and for the issuance of process, and the same having been argued by counsel, after due consideration, it is now ordered that said petition be, and it is hereby dismissed, at the cost of the petitioner. By the court. Jos. Buffington, judge. 1903, January 22, the following entries in the argument list appear on the record by direction of the court: "On November 20th, 1902 the petitioner presented in open court its petition, and counsel for the Pennsylvania Railroad Company appearing specially objected to the court's receiving the petition for want of jurisdiction. The court declined to receive the petition and fixed November 20, 1902, for a

hearing. On November 26, 1902, the hearing so fixed was had in open court, counsel for the Pennsylvania Railroad Company appearing specially and denying the court's power to entertain or act in pursuance of said petition, and the case was thereupon fully argued on both sides." Said petition was dismissed as per above order of January 20th, 1903. 1903, January 26, petition for writ of error and allowance of same filed. 1903, January 26, assignments of error filed. 1903, January 26, bond approved and filed. 1903, January 26, citation issued. 1903, January 26, citation
3 served on Patterson, Sterrett & Atcheson, attorneys for Pennsylvania Railroad Company.

Plaintiff's Petition.

To the honorable the judges of the said court:

The Western Union Telegraph Company, by its attorney, comes and represents:

(1.) That it is a telegraph company, a corporation duly organized under the laws of the State of New York relating to telegraph companies and a citizen and resident of the State of New York, having its principal place of business in the southern district of said State, and is and for many years last past has been doing business within the State of New York, the State of Pennsylvania, and the other States and Territories of the United States, and within the Dominion of Canada, as a telegraph company.

(2.) That the defendant, The Pennsylvania Railroad Company is a corporation duly organized under the laws of the State of Pennsylvania and is a citizen and resident of the State of Pennsylvania.

(3.) That the matters in controversy in this suit exceed the value of two thousand dollars, exclusive of interests and costs and are wholly between citizens of different States and arise under the Constitution and laws of the United States and therein the Western Union Telegraph Company claims privileges and rights under acts of Congress and the Constitution and laws of the United States.

(4.) The Western Union Telegraph Company further says that it was organized as a telegraph company as aforesaid in the year 1851, and thereupon and thereafter began the work of the construction and operation of telegraph lines in the State of New York and elsewhere, and since said time has been continuously engaged in the work of construction and operation of telegraph lines for the rapid dissemination of intelligence, and has extended its lines as a
4 continuous system into and through the State of Pennsylvania, and through all the States and Territories of the United States, and through the Dominion of Canada; and that its lines connect with ocean cables leading to Central and South American and foreign countries, through and over which system of lines it transmits upwards of 65,000,000 messages yearly for the public and for the Government of the United States, exclusively, of railroad

messages, messages relating to its own business, and messages transmitted over wires leased by it to private parties; that at the present time said system of telegraph lines under its operation and control, comprises over 192,000 miles of poles and cables and over 900,000 miles of wire; and its capital stock is distributed among over 11,000 stockholders. That the lines of telegraph in the system above described have been in operation for many years past and are relied upon by the public and by the Government of the United States and by the governments of foreign countries as a means of quick transmission of intelligence to and from all parts of the United States and to and from foreign countries.

(5.) That the legislature of the Commonwealth of Pennsylvania, by an act entitled "An act to incorporate the Atlantic & Ohio Telegraph Company," approved the 24th day of March, 1849, duly incorporated the Atlantic & Ohio Telegraph Company by that name and style, with authority, among other things, to make, use and maintain telegraph lines and communication by one or more routes between the cities of Philadelphia and Pittsburgh and intermediate places and from Pittsburgh to the Ohio State line; said act gave to the said Atlantic & Ohio Telegraph Company express power to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within this State, the said works so to be placed as not to interfere with the common use of such roads, highways, streets and waters, and the said corporation, and all other persons by them authorized, appointed or employed shall (it was enacted) have power and authority to enter into and upon, hold, occupy and enjoy any lands for the purpose of locating and constructing said telegraph line and using, maintaining, repairing and enjoying the same upon which the same may be located or which may be necessary or convenient for the location of the same, provided that such compensation previous thereto shall be made, secured or tendered to the owner or owners of any land or lands as shall be agreed upon between the parties or in such manner as hereinafter mentioned; and the said act gave, in the event of a failure or inability to agree upon such compensation, the right to the said company to have ascertained the amount of compensation or damages to the owner of lands taken and used by said company for telegraph or other purposes on its telegraph line or lines. By an act of assembly of the Commonwealth of Pennsylvania entitled "An act reviving the charter of the Atlantic & Ohio Telegraph Company, approved twenty-fourth March, one thousand eight hundred and forty-nine," approved February 25th, 1869, the charter of the said Atlantic & Ohio Telegraph Company was made perpetual. Annexed hereto and made a part hereof are true copies of said acts marked "Exhibit 1."

(6.) That afterwards, to-wit, on or about the 15th day of April, 1864, the said Atlantic & Ohio Telegraph Company entered into a contract of lease with the Western Union Telegraph Company, whereby the Atlantic & Ohio Telegraph Company leased and demised to the Western Union Telegraph Company, for the term of

10 years, commencing on the first day of April, 1864, and continuing thereafter until terminated by six months' notice at the option of either party, all of the telegraph lines, instruments, property, offices and franchises of the said Atlantic & Ohio Telegraph Company for and in consideration of which lease said Western Union
Telegraph Company covenanted and agreed to pay, free from
6 taxes, in quarterly payments of 2½ per cent. each in April,
July, October and January in each and every year of the term of said lease, to the treasurer of the said lessor, at the rate of 10 per cent. on the par value of the stock in the said company, excepting the amount owned at the time of each payment by the said lessee; the lease contained a covenant on the part of the lessee to keep the said lines in repair and deliver them and their appurtenances over to the lessor at the expiration of the lease in good working order. Annexed hereto and made a part hereof is a true copy of said lease marked "Exhibit 2."

(7.) Afterwards, to-wit, on or about the 20th day of June, 1864, the said Atlantic & Ohio Telegraph Company made an agreement with the defendant herein, to-wit, The Pennsylvania Railroad Company, whereby the said railroad company granted to the said telegraph company, so far as the railroad company had the legal right to do so, permission to construct and maintain a line of telegraph wires along and adjacent to the line of railroad of the said Pennsylvania Railroad Company from Philadelphia to Pittsburgh, in the State of Pennsylvania, for the consideration in the said agreement set forth, which agreement was without limit as to term or duration. Said contract was afterwards, to-wit, on or about the 23d of June, 1864, assigned by the said Atlantic & Ohio Telegraph Company to the Western Union Telegraph Company, which said lease and contract were ratified and confirmed by the act of the legislature of the State of Pennsylvania, entitled "An act supplemental to an act entitled 'An act to incorporate the Atlantic & Ohio Telegraph Company, approved March 24, 1849, and to confirm certain agreements executed by said company," approved May 3d, one thousand eight hundred and seventy-one, the same as if the said lease and contract had been made by virtue of express authority of law. By said act of assembly
it was also provided that said Atlantic & Ohio Telegraph
7 Company should have and possess all the rights, powers and
privileges conferred by the third and fourth sections of the act of the legislature of Pennsylvania to incorporate the Eastern Telegraph Company, approved the 5th day of April, 1866. Annexed hereto and made part hereof is a true copy of said act marked "Exhibit 3."

By said third and fourth sections of said act to incorporate the Eastern Telegraph Company it was provided, *inter ailia*, that said company should have the power to purchase, make, use and maintain any connecting or side lines. Annexed hereto and made part hereof is a copy of said 3d and 4th sections of said act marked "Exhibit 4."

Under the said lease and contract ratified and confirmed by

the legislature of Pennsylvania, and the acts of the Atlantic & Ohio Telegraph Company and of the plaintiff, The Western Union Telegraph Company, thereunder, the plaintiff is advised and states that The Western Union Telegraph Company has the right and power to exercise all the corporate rights, powers, privileges and franchises of the said Atlantic & Ohio Telegraph Company, including the right to appropriate, on inability to agree with the owner, all lands necessary for the construction, maintenance and operation of the said lines of telegraph from Philadelphia to Pittsburgh with any and all such branches therefrom as it may think proper.

(8.) That the Congress of the United States duly passed an act, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes;" and that the Western Union Telegraph Company, on or about the 8th day of June, 1867, duly accepted the provisions of said act by filing with the Postmaster General of the United States in writing the acceptance by said company of all the restrictions and obligations of the said act of Congress, and thereby and thereafter
8 continuously became, and has been and still is entitled to all the privileges and rights granted by the said act of Congress to telegraph companies thus accepting the benefits, restrictions and obligations of said act and the said telegraph company has, at all times, complied with the provisions of said act, and has rendered to the various departments and officers of the Government of the United States all the duties and services required by said act, giving to the said Government of the United States priority over all other business, and at rates fixed by the Postmaster General, which rates, as thus fixed by him, have been very much lower than the reasonable rates charged for similar services rendered to the general public.

A duly exemplified copy of the plaintiff's said acceptance of the said act of July 24, 1866, is hereto attached as part of this petition, marked "Exhibit No. 5."

(9.) That by act of Congress, approved June 8, 1872, all railroads or parts of railroads which then were or thereafter might be in operation, were declared to be established post-roads, and by a further act of Congress, approved March 1, 1884, all public roads and highways, while kept up and maintained as such, were declared to be post-roads; and by the provisions of said act of Congress, approved July 24, 1866, there was granted to any telegraph company then organized, or which might thereafter be organized under the laws of any State, and which accepted in writing the provisions of said act, the right to construct, maintain and operate telegraph lines through and over any portion of the public domain and over and along any of the military or post-roads of the United States which then were or might thereafter be declared such by law, subject to the condition only that such lines of telegraph should be so constructed and maintained as not to obstruct the navigation of streams or waters over, under or across which the same should be

laid, or interfere with the ordinary travel on such military or post-road.

9 (10.) That the said acts of Congress apply to the railroads of the defendant herein mentioned and described, and the said railroads are post roads of the United States duly established by act of Congress in that behalf provided, and also public roads and highways under said acts of Congress and the laws and constitution of the State of Pennsylvania relating to said railroads, to which said Pennsylvania Railroad Company is subject. That the plaintiff, The Western Union Telegraph Company, having duly filed its written acceptance with the Postmaster General of the restrictions and obligations of the said act of July 24, 1866, and fully complied with all the requirements of said acts of Congress, above mentioned has the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendant herein mentioned and described so as not to interfere with the ordinary travel thereon, and the plaintiff is ready and willing to make to the defendant, a just compensation for such use by the plaintiff of the roadway or right of way of the defendant company for the plaintiff's telegraph lines over and along the said railroads of the defendant.

(11.) That the said grant by the United States in and by the aforesaid acts of Congress of the right to construct, operate and maintain the telegraph lines of the plaintiff on the railroads of the defendant was a grant made upon a full, valuable and continuing consideration paid and rendered by the plaintiff to the United States, which consideration was the agreement of the plaintiff evidenced by the plaintiff's written acceptance of the act of July 24, 1866, duly filed on June 8, 1867, with the Postmaster General of the restrictions and obligations of the said act, and the performance by the plaintiff — all of the duties and obligations created and required by said acts of Congress. That the plaintiff has since acceptance of said act performed all its obligations required by said acts and by law, and the

10 plaintiff has given, ever since the date of filing of said acceptance, and is still giving, to the United States, and the several departments of the Government, and their officers, priority over all other business in the transmission of telegrams on the lines of the plaintiff company, situated over and along the railroads of the defendant, at rates annually fixed by the Postmaster-General, which rates are far less than the rates charged, paid and received by the plaintiff for the same kind of services from the public, and greatly less than the reasonable value of the said services rendered to the Government. The plaintiff has accepted, among others, the provisions of the said act of Congress of July 24, 1866, giving to the United States the right to purchase all of its telegraph lines and effects at an appraised value to be ascertained by five competent disinterested persons as provided by the said act of Congress. The plaintiff states that by reason of the premises, its acceptance of the said act of Congress, the construction and maintenance of its telegraph lines thereunder, and the continued performance by the plaintiff of the provisions of the said acts of Congress the right

granted by the said act of July 24, 1866, to the plaintiff to construct, maintain and operate its lines of telegraph over and along the railroads of the said defendant became vested, and the said grant is in full force and effect, and the plaintiff avers that its right to construct, maintain and operate its said lines of telegraph over and along the railroads and right of way of the defendant company is complete, the plaintiff being under an obligation or liability only to make fair and reasonable compensation to the defendant for the use of the said right of way or railways of the defendant by the plaintiff in the manner and under the restrictions of the said acts of Congress.

(12.) That, the defendant, The Pennsylvania Railroad Company is the owner of and in possession, control and operation as owner of lines of railroad in the State of Pennsylvania, beginning at
11 points on the boundary between it, the said State of Pennsylvania and the State of New Jersey at Trenton, and thence extending through the State of Pennsylvania to points on the boundary line between it and the States of Delaware, Maryland, Ohio and New York, respectively; which said lines of railroad lie partly in the eastern district and partly in the middle district and partly in the western district of said State of Pennsylvania, and form a continuous whole, and are operated as such, the main line extending from Philadelphia to Pittsburgh, with branches and connecting lines therefrom, as follows:

1. From the city of Philadelphia in a northeasterly direction to a point in the centre of the Delaware river, opposite Trenton, in the State of New Jersey.

2. From the city of Harrisburg in a southwesterly direction through Bridgeport, Mechanicsburg, Carlisle, Shippensburgh, Chambersburgh and South Pennsylvania Junction to the Maryland State line.

3. From the city of Pittsburgh in a northeasterly direction to the town of Driftwood.

4. From Lewistown Junction in a northerly direction to the town of Lewistown.

5. From Tiago Station to Mantua, both in the city of Philadelphia.

6. From Columbia, through York, Hanover and Littletown to Maryland State line.

7. From Middletown through Columbia and Peach Bottom to Maryland State line.

8. From Bridgeport through York, Hanover Junction and New Freedom to the Maryland State line.

9. From Marysville through Milesburg, Sunbury, Williamsport and the town of Fasset to the New York State line.

10. From Tyrone through Vail, Milesburg and Lock Haven to Williamsport.

12 11. From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgeway, Jonesonburg, Rolfe, Kane, Sheffield, Warren and Corry to Erie.

12. From Altoona to Hollidaysburg.

13. From Cresson to Ebensburg.
14. From Blairsville Intersection through Freeport and Kiskiminitas Junction to Butler.
15. From Blairsville to Indiana.
16. From Butler Junction to Allegheny.
17. From Greensburg to Uniontown.
18. From Brownsville to Pittsburg.
19. From Red Bank to Oil City.
20. From Millersburg to Williamstown.

That all said railways are within the State of Pennsylvania, and within the jurisdiction of this court; that at many points said lines of railway are constructed and maintained over and along the public streets, roads and highways in cities and villages and over and along public highways in the country and within the limits of said streets, roads and highways.

That in and by the constitution and the general public laws of the State of Pennsylvania, the said several railroads of the said defendant hereinbefore described, were created and made, and now are public highways, and as such subject to occupation and use by telegraph companies under the provisions and conditions of the act of Congress of July 24, 1866, as herein fully set forth.

(13.) That for many years last past there has been maintained and operated over and along the right of way of the said railroads hereinbefore described a line of telegraph owned, maintained and operated by the Western Union Telegraph Company, or its predecessors in title or estate or right, which has thus been maintained and operated with the consent of the defendant, The Pennsylvania Railroad Company, or its predecessor in title, and which has been and is now so located, maintained and operated as not to
13 interfere with the ordinary operation and management of the said railways or the ordinary travel thereon; that the Western Union Telegraph Company is in possession and control of the said telegraph lines and the same have been and still are connected with its system of telegraph in other States, Territories and foreign countries and have been continuously operated by it as a means for the transmission of intelligence for the public and for the Government of the United States and over the same are daily sent many thousands of messages to and from its main office in the city of New York and to and from the various States and Territories of the United States and foreign countries; that the said telegraph lines have been thus maintained and operated by the Western Union Telegraph Company for the 20 years last past with the consent of the Pennsylvania Railroad Company.

(14.) That said Pennsylvania Railroad Company has recently, to-wit, May 15th, 1902, notified the Western Union Telegraph Company to remove its poles and wires, and has with drawn its consent to plaintiff to longer occupy its premises; that thereupon the said Western Union Telegraph Company duly made application to the said Pennsylvania Railroad Company to have ascertained and determined the amount of compensation to which said Pennsylvania

Railroad Company is or would be entitled for the continued maintenance and operation of the said lines of telegraph over and along the said railways of the defendant under and subject to the terms, conditions and restrictions of the said act of Congress of July 24, 1866, and subject to the laws and constitution of the State of Pennsylvania; but said railroad company refused and declined to treat with the Western Union Telegraph Company or to agree or attempt to agree upon the amount of compensation for the construction, maintenance and operation of said telegraph lines or any of them over and along the said railways; on the contrary
14 the said defendant railroad company denies that the said acts of Congress or the said acts of Pennsylvania, or the said lease of the Atlantic and Ohio Telegraph Company confer upon the Western Union Telegraph Company any right to construct, maintain or operate its telegraph lines over and along said railways.

The Western Union Telegraph Company further says that the said lines of telegraph can continue to be located, maintained and operated without interference with the ordinary travel on the said railroads, or the ordinary use, management and operation of the said railways, and that the plaintiff seeks to construct, maintain and operate its lines of telegraph along said lines of railway, under and subject to the conditions named in said act of Congress of July 24, 1866, that such lines of telegraph shall be so constructed and maintained and operated as not to interfere with the ordinary travel on the said railroads, and subject also to the condition that when in the future, the location, maintenance and operation of the said lines should be found to interfere with the ordinary travel upon and use of said railways, to make such reasonable changes in the location, maintenance and operation of said parts of said lines of telegraph as that the ordinary travel upon said railways should be and remain uninterfered with by such lines of telegraph, as provided in the said act of Congress of July 24, 1866.

(15.) The Western Union Telegraph Company further represents that it is necessary for the continued maintenance and operation of its said lines of telegraph, that it shall have and enjoy the right to set and maintain poles along the right of way of the said railway company at such point or points thereon as that they will not interfere with the ordinary travel upon and use of the said railways, and avers that as the said poles have been heretofore and now are located thereon, they will not so interfere together with the right to place and maintain cross arms and fixtures thereon and to
15 string wires; also, the right to maintain and operate the same, with the further right to cable crossings where the same lines cross navigable waters, in order to connect the lines of wire upon the said poles with other lines of wire belonging to the said telegraph company, upon the said railways, as the plaintiff's system is now constructed maintained and operated for the communication of intelligence to all parts of United States, and as the same may be required to be extended and increased to meet the increasing demand for facilities of communication between different

parts of the country as an agent of interstate commerce, and as a method of transmitting messages for the Government of the United States and for the several departments thereof; that the plaintiff has sought from the said Pennsylvania Railroad Company its consent to the continuance in the present location upon the said right of way of the poles, cables, wires and fixtures where the same do not now interfere with the ordinary travel upon and use of said railways, with the provision that the same should be subject to reasonable changes to meet the requirements of changes in the situation of the said railways from time to time, so that the telegraph lines should not at any time hereafter interfere with the ordinary travel upon and use of the said railways; that the said railroad company has refused to consent to the said location or to any location of the said poles, cables and wires and fixtures over and along the said railway, or to agree or attempt to agree upon the amount of compensation which the said telegraph company should pay to the defendant for the use of their said railroads by the plaintiff in order to construct, maintain and operate on said railroads a line of telegraph by the plaintiff as hereinbefore set forth.

(16.) That the Western Union Telegraph Company by proper corporate action of its board of directors duly had and in the exercise of the power in it vested by virtue of said lease from the Atlantic & Ohio Telegraph Company and the acts of assembly
16 of the Commonwealth of Pennsylvania ratifying and confirming the same and in the exercise of all and every other power enabling it in any wise to do so, duly located, a single line of telegraph poles and wires over, along and upon the right of way of the line of railroad, branches and connecting lines owned, possessed, controlled and operated by the said Pennsylvania Railroad Company hereinbefore set forth and described and appropriated so much of the right of way not in actual use for railroad purposes as is now occupied and used by the existing line of telegraph poles and wires of the Western Union Telegraph Company as the same are now erected and constructed thereon; and also so much of the said right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires thereon over and along the defendant's said railroad where the said telegraph company now has no existing line of poles of which said part of said right of way is and was declared by the said Western Union Telegraph Company to be necessary for the errection, construction and maintenance of said line of telegraph poles and wires, the same being so constructed, maintained and operated on or near the edge of said right of way of said defendant company as not to interfere with the common use or operation of said lines of railroad by said Pennsylvania Railroad Company and subject always to reasonable changes.

The Western Union Telegraph Company further says that by due corporate action by its board of directors and officers it located a right of way for the construction, maintenance and operation of tel-

egraph lines along the rights of way of the Pennsylvania Railroad Company and the right of way of the properties of the railroad companies owned, operated, leased and controlled by said Pennsylvania Railroad Company, as shown upon a map hereby attached and described in a schedule attached to said map, said map and schedule being marked "Exhibits 6 and 7," respectively,
17 and that after said location and appropriation had been made by the Western Union Telegraph Company on the 12th day of November, 1902, a duly authorized officer of the Western Union Telegraph Company met George V. Massey, the general solicitor of the Pennsylvania Railroad Company in the premises duly authorized, and attempted to agree with said Pennsylvania Railroad Company upon a price and compensation to be paid for the use and occupation of the easement, right use, privilege or right of way so appropriated by the Western Union Telegraph Company for the construction, maintenance and operation of its said telegraph lines.

That the Western Union Telegraph Company was unable to agree with the Pennsylvania Railroad Company upon the compensation to be paid for the privileges, easements and rights of way sought to be appropriated by the Western Union Telegraph Company over and along the properties of the Pennsylvania Railroad Company and its owned, operated, leased and controlled lines as aforesaid, and thereupon the Western Union Telegraph Company duly tendered to the defendant Pennsylvania Railroad Company a bond in the sum of one hundred thousand ($100,000) dollars with the American Surety Company of New York as surety thereon to secure to said Pennsylvania Railroad Company compensation for any damage or injury that might be done the said Pennsylvania Railroad Company or the properties of other railroad companies in its ownership, or controlled and operated by it, or in its possession as lessee, and said bond was refused by said Pennsylvania Railroad Company and copy thereof is now attached to this petition and marked "Exhibit 8."

The Western Union Telegraph Company attaches hereto a map (Exhibit 6) showing upon the same the location of cable crossings, of poles, the number of wires thereon, the location of wires upon the bridges of the said railroad company, and also the location of
18 the line of poles with reference to the tracks and structures of the said railways as now located and maintained thereon and the parts of said right of way of the said defendant company upon which the same has been located by the board of directors of the said Western Union Telegraph Company and which have by it been duly appropriated as aforesaid for the erection, construction, and maintenance thereon and upon which location the plaintiff seeks to maintain and operate the said telegraph lines under the provisions, restrictions, and conditions of said act of Congress of July 24, 1866, and of the constitution and laws of the Commonwealth of Pennsylvania, including the said act incorporating the Atlantic & Ohio Telegraph Company and for such use of the right of way of the said defendant company the plaintiff is ready and willing and has offered and hereby again offers to make compensa-

tion; that the aforesaid corporate action of the Western Union Telegraph Company has been duly ratified and approved by corporate action in that behalf by the said Atlantic & Ohio Telegraph Company.

(17.) The Western Union Telegraph Company further says that on or about the 2nd day of October, 1891, it duly caused a certificate to be signed by its president and its corporate seal to be attached thereto and filed in the office of the secretary of state of the State of Pennsylvania, in compliance with the provisions of an act of the legislature of the State of Pennsylvania, entitled "An act to prohibit foreign corporations doing business in Pennsylvania without having known places of business and authorized agents," approved April 22nd, 1874, and acts amendatory and supplementary thereto.

Wherefore, Western Union Telegraph Company prays that this court may approve said bond, being Exhibit 8, and order the same to be filed for the use and benefit of the Pennsylvania Railroad Company in its own behalf and as the owner, lessee and operator of the railroads over whose properties the rights of way sought
19 to be appropriated by the Western Union telegraph extend as aforesaid, and may proceed to issue such process or take such modes of proceeding as may be agreeable to the principles and usages of law, and as shall be necessary to make inquiry and assessment and determination of the amount of compensation to be paid by the said Western Union Telegraph Company for the use of the roadway and right of way of the defendant and its branches and connecting lines to construct, maintain and operate its said line of telegraph and branches over and along the said railways of the defendant, subject to the conditions and provisions named in the said act of Congress of July 24, 1866, and the said acts of assembly of the State of Pennsylvania; and that upon the payment into court or to the defendant herein, as this court may direct, of the amount of such compensation for the said rights and interests acquired thereby by the said Western Union Telegraph Company, possession be adjudged to the Western Union Telegraph Company by this court of the said use, rights and interests according to law, and that the title to the said rights and interests as against the defendant thereby vest in the said Western Union Telegraph Company for the purposes aforesaid; and for such other and further proceedings, order and judgment as may be proper in the premises.

The plaintiff has caused this statement to be signed by its president and its corporate seal attested by its secretary to be hereto affixed.

ROBERT C. CLOWRY, *President.*

Attest: A. R. PROWDER, *Secretary.*

RUSH TAGGART,
HENRY ESTABROOK,
A. M. NEEPER,
Attorneys for Western Union Telegraph Company.

20 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

Robert C. Clowry, being duly sworn, says he is president of The Western Union Telegraph Company, plaintiff in the above-entitled action; and is familiar with the affairs of said corporation; that he has read the foregoing statement and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ROBERT C. CLOWRY.

Sworn to before me this 15th day of November, 1902.

CHARLOTTE A. VAN BRUNT,
[SEAL.] *Notary Public, Kings County, No. 4.*

Certificate filed in New York county.

EXHIBIT 1.

An act to incorporate the Atlantic & Ohio Telegraph Company, passed A. D. 1849.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That James K. Moorhead, William McKee, William Spering, Henry O'Reilly, Thomas Bakewell, Charles Avery, Alvah Strong, George Dawson and Morris S. Wickersham and their associates, and such other persons as may hereafter become stockholders in the company called the Atlantic & Ohio Telegraph Company, their successors and assigns, shall be and they are hereby made and constituted a body politic and corporate for the purpose of making, using and maintaining telegraph lines and communications by one or more routes between the cities of Philadelphia and Pittsburgh and intermediate places and from Pittsburgh to the Ohio State line by the name, style, and title of the "Atlantic and Ohio Tel-
21 egraph Company," and by the same name, style, and title shall have perpetual succession and all the privileges and immunities belonging to a corporation; may sue and be sued, plead and be impleaded, complain and defend in all courts of law and equity, of record or otherwise; may purchase, receive, have, hold and enjoy, to them, their successors and assigns, such lands, tenements, and heredi-ments, goods, chattels, and all estate, real, personal and mixed, of what kind and quality soever, as may be necessary for the purposes of the company, and the same from time to time may sell, convey, mortgage, grant, alien, dispose of; to make dividends of such portions of their profits as they deem proper, and

also may make and have a common seal, the same to alter and renew at pleasure, and also to ordain, establish and put in execution such by-laws or ordinances and regulations as shall appear necessary and convenient for the government of said corporation hereby created not being contrary to the Constitution and laws of the United States and this Commonwealth, and generally may do all and singular the matters and things which to them shall lawfully appertain to do for the well-being of the said corporation and the due management and ordering of the affairs and business of the same. Provided that nothing herein contained shall be so considered and construed as giving to the said corporation any banking privileges or franchises or any privileges or franchises but such as may be necessary or belong to the making, using, or maintaining the said telegraph lines and communications.

SECTION 2. That the capital stock of said corporation hereby created shall be three hundred thousand dollars and shall be divided into six thousand shares of fifty dollars each and the telegraph line now in use between the cities of Philadelphia and Pittsburg, with the instruments and fixtures thereto belonging, together with the interest in the patent now in use, or any other patent the proprietors may deem it expedient to apply to said line, shall be taken and
22 considered to be the capital of said corporation; the directors shall have power, for the purpose of erecting additional lines or putting on additional wires, to increase the capital stock to five hundred thousand dollars by increasing the number of shares to ten thousand. Certificates of stock shall be issued, signed by the president and secretary and sealed with the common seal of the corporation. Said stock may be transferred in person or by attorney under such regulations as may be prescribed by the laws of the company.

SECTION 3. That the annual meetings of stockholders shall be held on the third Thursday in July of each and every year hereafter, of which thirty days' notice shall be given; at which meeting nine directors shall be elected to manage the affairs of the company, to serve for one year or until their successors are chosen. The directors shall elect one of their number president, and such other officers, and appoint such agents as they may deem necessary, and fix the amount of the salaries attached to the several offices and shall exercise all powers pertaining to the making, maintaining, using and managing such telegraph lines and the affairs, interest, and business of the said corporation authorized by its by-laws. The persons named in the first section of this act shall serve as directors until the next annual election.

SECTION 4. That at every election for officers each share shall entitle the holder thereof to one vote to be given by ballot. Provided, that no one stockholder shall be entitled, on account of the stock held by him to cast more than one-fourth of the entire vote, to which all the shares, if held singly, would be entitled, and absent stockholders may vote by agents or proxies, producing written authorities.

Powers.

SECTION 5. That it shall and may be lawful for the said corporation hereby created to erect and construct works, offices, 23 fixtures, and structures along and across any of the roads, highways, streets, and waters within this State; the said works to be so placed as not to interfere with the common use of such roads, highways, streets and waters; and the said corporation and all other persons by them authorized, appointed or employed, shall have power and authority to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing said telegraph lines and using, repairing, maintaining and improving the same upon which the same may be located, or which may be necessary or convenient for the location of the same: *Provided*, That such compensation previous thereto shall be made, secured or tendered to the owner or owners of any land as shall be agreed upon between the parties, or in such manner as is hereinafter mentioned.

Damages.

SECTION 6. That if the said corporation and the owner or owners of any lands through which the said telegraph lines shall pass cannot agree upon the prices or compensation to be paid by the said corporation for such lands taken or used or the damages done thereto, it shall and may be lawful for either party to apply to the court of common pleas for the county in which such lands shall lie, by petition, stating the facts in relation thereto; and thereupon it shall be the duty of the said court to appoint five disinterested persons of the proper county or of any adjoining county, and to fix a time, not less than twenty nor more than thirty days thereafter, for the said viewers to meet upon the premises where the damages are alleged to be sustained, of which time and place ten days' notice shall be given by the party petitioning to said viewers and to the other party; and the said viewers when so met shall first be sworn or affirmed justly and equitably to assess the damages, if any, which may have been or are likely to be sustained by the owner or owners of such lands and shall then view the premises and justly and equitably assess and estimate the damages which may have been or are likely to 24 be sustained by the owner or owners of such land through which the said telegraph lines shall pass, and deducting from the damages the value of the advantages and benefits which may have accrued or are likely to accrue to the owners of said land from the said telegraph lines or works connected therewith, and to make out a report of their assessment of damages, signed by the said viewers, and return the same to the court appointing them at the next term thereof, which report being confirmed by said court shall be considered a judgment of said court and collected in like manner as other judgments of the same court are collected, with the costs of court: *Provided*, That if the proper officer of said company, at any time before application made by either party for the appointment of viewers in manner hereinbefore directed, shall tender to the owner or owners of said land a sum of money in full compensation for the said damages, said company shall not be liable for costs in any subsequent proceeding, unless such owner of land shall receive a

larger sum than the previous tender of said company Provided, however, that the said judgment shall be subject to reversal upon appeal or by writ of error taken by either party, as other judgments in the said court are liable.

SECTION 7. That if any person or persons shall willfully or knowingly break, injure or destroy or interrupt the telegraph lines and communications, or any part thereof, or any work, erection, edifice, structure or device, or any part thereof erected by said company or to be erected by them in pursuance of this act, he or they shall pay the said corporation one hundred dollars for said offense, and shall be further liable for all damages which the said corporation may suffer in repairing the injury and from the interruption of their business, to be recovered in an action of trespass; and if any person incurring the penalty aforesaid shall, through insolvency or other causes, be unable or fail to pay
25 the penalty or damages aforesaid, and shall a second time commit trespass upon the said lines or any part thereof as aforesaid, he, she or they shall be liable upon conviction thereof to an imprisonment in the county jail of not less than one month nor more than six months.

SECTION 8. That dividends of so much of the profits of the company as shall be deemed expedient shall be declared quarterly in the months of January, April, July and October in each year. Provided that said company and all other telegraph companies heretofore chartered by the legislature of this Commonwealth and those which shall hereafter be chartered, shall pay to the State treasurer for the use of this Commonwealth, a tax upon their dividends as follows, viz., upon all dividends amounting to and exceeding eight per centum and not exceeding ten per centum, a tax of ten per centum; upon dividends amounting to and exceeding ten per centum and not exceeding twelve per centum, a tax of twelve per centum; and upon all dividends amounting to and exceeding twelve per centum, a tax of twenty per centum. Provided, that no dividend shall be declared which shall impair the capital stock of said company.

SECTION 9. That it shall be lawful for the company incorporated by this act to form a union with any company or companies now incorporated, or that may be hereafter incorporated by the States of Ohio, Kentucky, Indiana, Illinois and Missouri or any of them, for the purpose of constructing, using or maintaining a telegraph line or lines connecting Cincinnati, Louisville and St. Louis with Pittsburg, so that the stock of the said companies may constitute a common stock, upon such terms and conditions as the said companies respectively shall agree upon, and that as soon as such union shall have been effected, and a true copy of the agreement made for that purpose duly certified under the corporate seal of said companies shall have been filed in the office of the secretary of this Commonwealth, the stockholders of the said companies shall become
26 one body corporate and politic under the name and style of the "Philadelphia and St. Louis Telegraph Company," with

all the privileges incident to a corporation, and with all the rights, powers and privileges which by virtue of this act are vested in the company hereby incorporated.

SECTION 10. It shall be the duty of the president and secretary of every telegraph company, incorporated or otherwise, within the Commonwealth of Pennsylvania, to make an annual statement under oath or affirmation to the auditor general of the affairs and condition of every such company, setting forth the amount of the capital stock paid in, the amount of receipts and expenditures, and the amount of the dividends *are* declared for the then current year, such statement to be made and returned in the month of November in each and every year; and if said president and secretary shall neglect or refuse to make and return to the auditor general such annual statement, a tax of five per cent. shall then and in that case be levied on the capital stock to be collected in the same manner as is provided for the collection of debts due the Commonwealth.

SECTION 11. This charter shall continue in force for the period of twenty years and no longer unless renewed by the legislature; and the legislature hereby reserves the right to alter, amend or annul this charter whenever its privileges may be abused or whenever its provisions may be found injurious to the citizens of this Commonwealth.

(Signed) WILLIAM F. PACKER,
Speaker of the House of Representatives.

(Signed) GEORGE DARSIE,
Speaker of the Senate.

Approved the twenty-fourth day of March, one thousand eight hundred and forty-nine.

(Signed) WILLIAM F. JOHNSTON.

27 SECRETARY'S OFFICE.

PENNSYLVANIA, *ss:*

I do certify that the above and foregoing is a true and correct copy of the original act entitled "An act to incorporate the Atlantic and Ohio Telegraph Company" as the same remains on file in this office.

In testimony whereof I have hereunto set my hand and seal and caused to be affixed the seal of the secretary's office at Harrisburg, the sixteenth day of April, anno Domini, one thousand eight hundred and forty-nine.

(Signed) A. L. RUSSELL,
Deputy Secretary of the Commonwealth.

An act reviving the charter of the Atlantic & Ohio Telegraph Company, approved twenty-fourth March, one thousand eight hundred and forty-nine.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly

met, and it is hereby enacted by the authority of the same That the charter of the Atlantic & Ohio Telegraph Company entitled "An act to incorporate the Atlantic & Ohio Telegraph Company," approved twenty-fourth March one thousand eight hundred and forty nine be and the same is hereby extended and renewed without limit of duration, and the said corporation shall have perpetual succession. Provided: That said corporation shall pay into the treasury of the Commonwealth such bonus and taxes as are now or may hereafter be required by law.

(Signed) JOHN CLARK,
Speaker of the House of Reps.

(Signed) WILMER WORTHINGTON,
Speaker of the Senate.

Approved the twenty-fifth day of February, anno. Domini, one thousand eight hundred and sixty-nine.

(Signed) JOHN W. GEARY.

28 Office of the secretary of the Commonwealth.

HARRISBURG, *Feb. 25th, A. D.* 1869.

PENNSYLVANIA, *ss:*

I do hereby certify that the foregoing and annexed is a full, true, and correct copy of the original act of the General Assembly entitled "An act reviving the charter of the Atlantic & Ohio Telegraph Company," approved twenty-fourth March one thousand eight hundred and forty-nine, as the same remains on file at this office.

In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year first above written.

(Signed) ISAAC B. GASH,
Deputy Secretary of the Commonwealth.

EXHIBIT 2.

This article of agreement, made the fifteenth day of April, A. D. 1864, between the Atlantic & Ohio Telegraph Company, of the first part, and the Western Union Telegraph Company, of the second part, witnesseth:

That for and in consideration of the covenants hereinafter mentioned, the said party of the first part, in pursuance of resolution of their board of directors authorizing and directing the same, does hereby lease to the party of the second part for the term of ten years, commencing on the first day of April, A. D., 1864, and continue thereafter until terminated by six months' notice, at the option of either party, all their telegraph lines, instruments, property, offices and franchises, with the right to work said lines at the expense of

the party of the second part, and enjoy the profits of the same as fully and effectually as heretofore done by the party of the first part, and the party of the second part agreeing to assume all the present indebtedness, liabilities, contracts and obligations of the first part.

29 And in consideration of the aforesaid lease, the said party of the second part does hereby covenant and agree to pay, free from taxes, in quarterly payments of two and a half per cent. each, in April, July, October, and January in each and every year of term, to the treasurer of the party of the first part, at the rate of ten per cent. on the par value of the stock in said company, excepting the amount owned at the time of each payment by the said lessee, party of the second part, the stock being fifty dollars per share.

The party of the second part also agree to keep said lines in repair, and deliver them and all their appurtenances covered by this agreement over to the party of the first part, at the expiration of this lease, in as good working order as they now are.

It is also understood and agreed between the parties hereto, that the party of the first part shall have the privilege of making the usual quarterly dividend of two dollars per share during the present month.

It is also understood that the lessees assume the payment of the salaries of the officers of the first party from the first day of April, A. D. 1864, the same being one thousand three hundred and thirty-three $\frac{33}{100}$ dollars, including the salary of the superintendent.

In witness whereof the president and secretary of the Atlantic and Ohio Telegraph Company, and J. H. Wade, a committee appointed to negotiate and conclude agreement on behalf of the Western Union Telegraph Company, by resolution of said company, dated April 4th, A. D. 1864, have hereunto set their hands and seals.

J. H. BERRYHILL, [L. S.]
President A. & O. Tel. Co.

H. H. SHILLINGFORD, [L. S.]
Secretary A. & O. Tel. Co.

J. H. WADE, [L. S.]
For the Western Union Tel. Co.

30 EXHIBIT 3.

An act supplementary to an act entitled "An act to incorporate the Atlantic & Ohio Telegraph Company," approved March twenty-fourth, one thousand eight hundred and forty-nine, and to confirm certain agreements executed by said company.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same, That the

Atlantic & Ohio Telegraph Company shall be entitled to all the privileges of the third and fourth sections of an act to incorporate the Eastern Telegraph Company, approved fifth of April, one thousand eight hundred and sixty-six, and that any agreement or lease heretofore at any time made by said company to or with any other persons or corporations having telegraph lines within or out of this State are hereby ratified and confirmed, the same as if they had been made by virtue of express authority of law.

(Signed) JAMES WEBB,
Speaker of the House of Representatives.

(Signed) WILLIAM A. WALLACE,
Speaker of the Senate.

Approved the third day of May, anno Domini one thousand eight hundred and seventy-one.

(Signed) JOHN W. GEARY.

Exhibit 4.

Sections 3 and 4 of an act to incorporate the Eastern Telegraph Company, April 5th, 1866 (in volume of 1868), referred to in the foregoing acts.

Section 3. That the said corporation shall have power to connect, by contract, with other persons or corporations having other telegraphic lines within or out of this State, for the purpose aforesaid; and it may also form a union with or lease to other 31 corporations, associations or individuals, incorporated by this Commonwealth or any other State, its own lines, with their fixtures and apparatus, or lease from any individuals, associations or corporations incorporated by this Commonwealth or any other State, their lines, fixtures and apparatus, and when such unions as aforesaid are formed, the stock may form a common stock upon such terms and conditions as the said companies or associations respectively shall agree upon, and that as soon as such union shall be effected and a true copy of the agreement made for that purpose, duly certified under the corporate seal of the said companies, shall have been filed in the office of the secretary of the Commonwealth, the stockholders of the said companies shall become one body, corporate and politic, under such name and style as they shall adopt and agree upon and embody in their certificate, with all the rights and privileges incident to a corporation and with all the rights, powers and privileges which, by virtue of this act, are vested in the company hereby incorporated.

Section 4. That the said corporation shall have power to purchase, make, use and maintain any connecting or side lines.

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EXHIBIT No. 5.

POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *February* 17, 1899.

(Ten cent revenue stamp.)

I, Perry S. Heath, acting Post-master-General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department.

In testimony whereof, I have hereto set my hand and caused the seal of the Post Office Department to be affixed, at the city of Washington the day and year above written.

PERRY S. HEATH,
Acting Postmaster-General.

[SEAL.] B. W. T.

32 Annexed to the foregoing is the following, to wit:

Western Union Telegraph Company.

Meeting of the board of directors at the executive office, 145 Broadway, New York.

JUNE 5TH, 1867.

Resolved, That this company does hereby accept the provisions of the act of Congress entitled "An act to aid the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; and that the secretary be, and is hereby authorized and directed to file this resolution with the Postmaster-General of the United States, duly attested by the signature of the acting president of the company and the seal of the corporation, in compliance with the fourth section of said act of Congress.

Adopted unanimously.

[Seal Western Union Telegraph Co.]

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.
O. H. PALMER,
Sec'y W. U. Tel. Co.
JOS. H. BLACKFAN,
Chief Clerk.

Filed June 8th, 1867.

EXHIBIT 6.

(Map.)

(Here follows map marked p. 33.)

34 "EXHIBIT 7."

Schedule attached to map of lines of Pennsylvania Railroad Company, showing the rights of way to be appropriated by the Western Union Telegraph Company and the purposes to which the same are to be devoted.

Location.	Purpose.
No. 1. Main line from Philadelphia to Pittsburg, via Harrisburg.	1. Right of way for existing pole lines of Western Union Telegraph Co., with wires thereon.
No. 2. From the city of Philadelphia, in a northwesterly direction, to a point in the centre of the Delaware river, opposite Trenton, in the State of New Jersey.	2. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 3. From the city of Harrisburg, in a southwesterly direction, through Bridgeport, Mechanicsburg, Carlisle, Shippensburg, Chambersburg, and South Pennsylvania Junction to the Maryland State line.	3. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 4. From the city of Pittsburg, in a northeasterly direction, to the town of Driftwood.	4. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 5. From the town of Lewistown Junction, in a northwesterly direction, to the town of Lewistown, thence to Logan.	5. Right of way for line of poles to support existing wires of Western Union Telegraph Co.
35 No. 6 From Tioga Station to Mantua.	6. Right of way for existing pole lines of Western Union Telegraph Company, with wires thereon.
No. 7. From Columbia, through York, Hanover, Littlestown, to Maryland State line.	7. Right of way for new pole lines from Columbia to Hanover, to support Western Union Telegraph Company's wires; and right of way for the retention of existing pole lines of Western Union Telegraph Company, with wires thereon, from Hanover to Littlestown and from Littlestown to State line.

No. 8. From Middletown, through Columbia and Peach Bottom to Maryland State line.

8. Right of way for erection of new line of poles to support existing wires of Western Union Telegraph Company.

No. 9. From Bridgeport, through York, Hanover Junction and New Freedom to the Maryland State line.

9. Right of way for erection of new line of poles to support existing wires of the Western Union Telegraph Company.

No. 10. From Marysville through Millersburg to Sunbury; from Williamsport Junction, through Fassett to the New York State line.

10. Right of way from Marysville, through Millersburg to Sunbury, for erection of new line of poles to support existing wires of the Western Union Telegraph Company; from Sunbury to Williamsport Junction for existing line of poles and wires thereon; from Williamsport Junction, through Fassett, to the New York State line, for erection of new poles for existing wires of Western Union Telegraph Company.

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No. 11. From Tyrone through Vail, Milesburg to Williamsport.

11. Right of way from Tyrone to Lockhaven for new line of poles to support existing wires of Western Union Telegraph Company; right of way for retention of existing line of poles of Western Union Telegraph Company, with wires thereon from Lockhaven to Williamsport.

No. 12. From Lockhaven, through Renovo, Keating, Driftwood, Emporium, Ridgway, Johnsonburg, Rolfe, Kane, Sheffield, Warren and Corry to Erie.

12. Right of way for location of new lines of poles to support existing wires, of Western Union Telegraph Company.

No. 13. From Altoona to Hollidaysburg.

13. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

No. 14. From Cresson to Ebensburgh.

14. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

No. 15. From Blairsville intersection, through Freeport and Kiskiminetas Junction to Butler.

15. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

No. 16. From Blairsville to Indiana.

16. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

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No. 17. From Butler Junction to Allegheny.	17. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.
No. 18. From Greensburg to Uniontown.	18. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.
No. 19. From Brownsville to Pittsburg.	19. Right of way for erection of new line of poles to support existing wires of Western Union Telegraph Company.
No. 20. From Red Bank to Oil City.	20. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.
No. 21. From Millersburg to Williamstown.	21. Right of way for erection of new line of poles of Western Union Telegraph Company for existing wires.

Exhibit 8.

Know all men by these presents, that the Western Union Telegraph Company, principal, and the American Surety Company, surety, both said companies being corporations existing under and by virtue of the laws of the State of New York (hereinafter called obligors), are held and firmly bound unto the Pennsylvania Railroad Company, a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania (hereinafter called obligee), in the sum of one hundred thousand dollars, ($100,000) to be paid said obligee, its certain attorney, successors, and assigns, to
38 which payment well and truly to be made, said obligors bind themselves, and each of them, their respective successors and assigns, jointly and severally, firmly by these presents.

Witness the respective common and corporate seals of the said obligors, duly affixed hereto and attested by the signatures of their respective — presidents and secretaries, or attorneys, this 1st day of October, in the year of our Lord, one thousand nine hundred and two.

Whereas, said The Western Union Telegraph Company, obligor above named, has been and is now operating lines of telegraph for public use, by and with the consent of the said obligee, and other railroad corporations owned, leased, or operated by said obligee, upon and along the rights of way and properties of said obligee, and the railroad corporation aforesaid, and is desirous of continuing to maintain and operate said lines of telegraph upon and along said rights of way and properties, to the end that said lines of telegraph may be maintained and operated by said obligator perpetually upon

and subject to the conditions and regulations that may be imposed upon said obligator in the use and occupation of said properties and rights of way, as may be imposed according to law, but otherwise to be free from the control of said obligee, and

Whereas, pursuant to said corporate rights and franchises vested in said principal obligor by law, it has, by due corporate action, located certain lines of telegraph and the necessary space for their maintenance and operation along and upon the rights of way and properties of said obligor and the railroad corporation owned, leased, controlled or operated as aforesaid, as specified and described in and by "Schedule A" attached hereto, and shown upon the map forming part thereof, both said schedule and said map being specifically made part hereof.

Now the condition of this obligation is such, that if said obligators, or either of them, shall pay or cause to be paid to said
39 obligee such damages accruing by reason of the entry upon, use, occupation and appropriation of the right to construct, maintain and operate said lines of telegraph, together with the necessary space and land for their construction, maintenance and operation as may be agreed upon by said principal obligor and said obligee, or as may be awarded in proceedings to ascertain said proceedings according to law, then this obligation to be void, other- to be and remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By ROBERT C. CLOWRY, *President.*

Attest: A. R. BREWER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKLES, *Vice President.*
CORTLANDT S. VAN RENSSELAER,
[L. S.] *Attorney.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 1st day of October, 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do
40 not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further stated that

he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

E. J. PERCEY,
[L. S.] *Notary Public, Kings County.*

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1892, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, ss:

I, Cortland S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of
41 said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Witness my hand and the seal of the company at the city of New York, this 1st day of October, 1892.

CORTLANT S. VAN RENSSELAER,
[L. S.] *Attorney.*

Affidavit of Henry D. Estabrook.

STATE OF NEW YORK, }
City and County of New York, } ss:

Henry D. Estabrook, being first duly sworn, says that he is solicitor for the Western Union Telegraph Company with headquarters at New York city.

Affiant further says:

That on the 12th day of November, 1892, he went to the city of

Philadelphia for the purpose of serving written notice on the Pennsylvania Railroad, that the Western Union Telegraph Company, through its board of directors, and the Atlantic & Ohio Telegraph Company, through its board of directors, took the corporate action respecting the construction, maintenance and operation of lines of telegraph along the lines of railway owned, controlled or operated by the Pennsylvania Railroad Company, and further to request the Pennsylvania Railroad Company to name a price for the rights and privileges which the Western Union Telegraph Company desires for its and for the Atlantic & Ohio Telegraph line operated by it as specified and defined in Exhibits "B" and "B" attached to said notice.

Affiant further says that, assuming that the Pennsylvania Railroad Company would refuse to negotiate with the Western Union Telegraph Company and the Atlantic & Ohio Telegraph Company as to the amount to be paid by said telegraph company or either of them for the privileges sought to be acquired by said telegraph companies, there had been prepared and executed, prior to the bringing the city of New York, for the city of Philadelphia, a bond
87 in the sum of $500,000, by the Western Union Telegraph Company, as principal, and the American Surety Company, of New York, as surety, which bond it was the purpose of affiant to tender to said Pennsylvania Railroad Company in the event it should refuse to negotiate as requested.

Affiant further says that a notice had also been prepared to advance, to the effect that the Western Union Telegraph Company would present the bond tendered to the Pennsylvania Railroad Company to the circuit court of the United States at Pittsburg, State of Pennsylvania, for its approval. The time of said presentation being left blank in said notice and the notice not served.

Affiant further says that it was the purpose to serve said notice upon the president of the Pennsylvania Railroad Company, if some one acting for him, but that, as a matter of courtesy to acquaint access to the president of said Pennsylvania Railroad Company through the legal department of said railroad company.

Affiant further says that he was told by Mr. Price, of the legal department of the said railroad company, that owing to pressing engagements affiant could not, at the time, have access either to the general solicitor of said railroad company or to the president thereof, but that if affiant would call at the following day, to wit: November 13th, at the hour of 10:30 a. m. the affiant would be admitted to an interview with the general solicitor of the railroad company.

Affiant was requested by Mr. Price to leave with him copies of the various papers above referred to, with the understanding that such papers were accepted for examination, and a request for interview for the following day, but was not to be considered as having been served in fact, to which affiant consented.

Accordingly, on the following day, November the 13th, 1902, a

10:30 o'clock a. m., affiant called at the legal department of
43 the said railroad company and had an interview with the general solicitor of said company, Mr. George V. Massey; and affiant says that said general solicitor had before him the various papers left by the affiant the day before; and that professing to act for and on behalf of the said Pennsylvania Railroad Company, the said George V. Massey refused to negotiate as to the amount of compensation to be paid by the Western Union or the Atlantic & Ohio Telegraph Companies for the privileges requested, and refused to accept the bond tendered by this affiant. And affiant says that the said George V. Massey first read and then delivered to this affiant a written statement, which is hereto attached, marked Exhibit "I" and made a part of this affidavit.

Affiant further says that thereupon he notified in writing the said Massey, that the bond in question would be tendered to the circuit court of the United States, at Pittsburg, State of Pennsylvania, on the — day of —— 1902.

Affiant further says that he particularly requested the said George V. Massey, general solicitor, as aforesaid, to either himself note in writing on each of said documents and notices, the fact that it was served upon his company, or that he have the president of his company do so, but said Massey declined so to do.

Affiant further says that copies of the aforesaid documents and notices so served upon the Pennsylvania Railroad Company by the affiant on the said 13th day of November, 1902, concerning the corporate action of said Western Union Telegraph Company and said Atlantic & Ohio Telegraph Company, the bond and the notice of application to the court for its approval, are hereto attached, marked Exhibits 2, 3 and 4, respectively, and made part of this affidavit,

Further, affiant saith not.

HENRY D. ESTABROOK.

44 Subscribed in my presence and sworn to before me this 14th day of November, 1902.

CHARLOTTE A. VAN BRUNT,
Notary Public, Kings County.

Certificate filed in New York county, No. 4.

EXHIBIT 1.

To the Western Union Telegraph Company:

Your written application, dated November 11th, 1902, this day submitted to the Pennsylvania Railroad Company, referring to certain action of the board of directors of your company, and of the Atlantic and Ohio Telegraph Company, respecting the location, construction, maintenance and operation of lines of telegraph along

the lines of railway owned, controlled or operated by the Pennsylvania Railroad Company, as set forth in the copies thereto annexed, marked with the letters "A" and "B," and requesting the Pennsylvania Railroad Company to name a price for the rights and privileges which you desire in connection therewith, is hereby respectfully answered as follows:

1. Some of the lines of railway whereon by said pretended action you have undertaken to locate a telegraph line are neither owned by, nor leased to, the Pennsylvania Railroad Company; and, although others of said lines of railway are operated by said railroad company under lease or otherwise, they are not owned by the latter.

2. The Pennsylvania Railroad Company requires and needs for its proper corporate purposes, and has in actual use accordingly, the whole of the right of way of its railroad. Any location of a telegraph line upon said right of way, or attempted appropriation of any portion thereof by your company, will seriously interfere with and impede the use and occupation of said right of way for the necessary and proper corporate purposes of said railroad company; and said railroad company will not permit any such location upon its right of way by your company, but—expressly denying that either your company or the Atlantic and Ohio Telegraph Company are possessed of any such rights or powers in this behalf as you pretend to assert—will, by all proper and lawful means, challenge and contest the same, and resist any attempted exercise thereof, or attempted location or appropriation of any portion of said railroad company's right of way for or in connection therewith.

3. The Pennsylvania Railroad Company insists that neither your company nor said Atlantic and Ohio Telegraph Company are possessed of, or invested with, any lawful right or power, in any capacity whatsoever, either to make your said pretended location on the right of way or property of said railroad company, or any part thereof, or adversely to enter upon or appropriate to your uses any portion thereof, and that said railroad company will accordingly resist any and all attempts of your company or said Atlantic and Ohio Telegraph Company, accordingly.

4. The Pennsylvania Railroad Company refuses to name any price for the rights and privileges desired by your application, and also refuses, and will continue to refuse, any and all offers or propositions by your company, either in its own behalf or as alleged operator of said Atlantic and Ohio Telegraph Company, for the acquisition by purchase or otherwise of said rights and privileges your application seeks to obtain upon the right of way and property of the railroad company.

5. The Pennsylvania Railroad Company refuses to accept any bond which you tender, or may hereafter tender, in connection with any pretended taking or appropriation of any portion of its right of way or property, which may at any time be attempted by you under any of the powers you pretend to possess and assert, the said rail-

road company hereby challenging and denying that either
46 your company or said Atlantic and Ohio Company can lawfully exercise the said pretended powers.

THE PENNSYLVANIA RAILROAD COMPANY,
By R. MILTON SPEER, *General Solicitor.*

Dated November 13, 1902.

EXHIBIT 2.

To the Pennsylvania Railroad Company:

The Western Union Telegraph Company respectfully represents that the board of directors of the Western Union Telegraph Company and of the Atlantic & Ohio Telegraph Company took due corporate action respecting the construction, maintenance, and operation of lines of telegraph along the lines of railway owned, controlled, or operated by the Pennsylvania Railroad Company, copies of which are hereto annexed marked "A" and "B."

The Western Union Telegraph Company respectfully requests the Pennsylvania Railroad Company to name a price for the rights and privileges which the Western Union Telegraph Company desires for itself and as the operator of the Atlantic & Ohio Telegraph lines, as specified and defined in Exhibits "A" and "B" attached hereto.

Dated ——, 1900.

Respectfully,

THE WESTERN UNION TELEGRAPH COMPANY,
By R. C. CLOWRY, *President.*

47 Extract from minutes of the executive committee of the board of directors of the Western Union Telegraph Company, meeting to be held October 1st, 1902, a quorum being present.

"The president reported to the committee that he had caused to be prepared a map showing the route of the lines of telegraph poles and wires, as now maintained and operated by the company from Philadelphia to Pittsburg, with the branches thereof, as shown upon said map, and extending to the boundaries between the State of Pennsylvania and the States of Maryland and New Jersey, and to other points within the State of Pennsylvania, and constructed upon the right of way of the railroad owned, leased, controlled or maintained and operated by the Pennsylvania Railroad Company, and the same was submitted to the committee. Thereupon, and upon motion duly made, the following resolution was unanimously passed:

Resolved, That, in the exercise of the power in it vested by virtue of the Constitution and laws of the United States, and of the constitution and laws of the Commonwealth of Pennsylvania, and by virtue of the lease made to it by the Altantic & Ohio Telegraph Company and the acts of the assembly of the Commonwealth of Pennsylvania, ratifying and confirming the same, and in the exercise of all and every other power in any wise enabling it so to do, this company does hereby locate a single line of telegraph over and along and upon the right of way of the railroad owned, maintained or operated by the Pennsylvania Railroad Company, and extending from the city of Philadelphia, through the counties of Philadelphia, Montgomery, Delaware, Chester, Lancaster, Dauphin, Perry,
48 Juniata, Mifflin, Huntingdon, Blair, Cambria, Westmoreland and Allegheny, to the city of Pittsburg, in the State of Pennsylvania, and also a single line of telegraph upon, over and along the rights of way of the following branch or connected railroads owned, leased or controlled, maintained and operated by the Pennsylvania Railroad Company, to-wit:

1. From the city of Philadelphia, in a northeasterly direction to a point in the center of the Delaware river, opposite Trenton, in the State of New Jersey;

2. From the city of Harrisburg, in a southwesterly direction through Mechanicsburg, Carlisle, Shippensburg, Chambersburg, and South Pennsylvania Junction to the Maryland State line;

3. From the city of Pittsburg, in a northeasterly direction to the town of Driftwood;

4. From Lewistown Junction, in a northerly direction to the town of Lewiston.

5. From Holmesburg Junction to Bustleton;

6. From Tioga Station to Mantua, both in the city of Philadelphia;

7. From Philadelphia, through Norristown, Phœnixville, Reading, Pottsville and St. Clair to New Boston Junction;

8. From St. Clair, through Mahanoy Plane to Shenandoah;

9. From Frazer to West Chester;

10. From Downington to New Holland;

11. From Pomeroy to the Delaware State line;

12. From Dillerville, through Columbia, York and Hanover, through Littlestown to Maryland State line;

13. From Middletown, through Columbia and Peach Bottom to Maryland State line;

49 14. From Bridgeport, through York, Hanover Junction and New Freedom to Maryland State line,

15. From Marysville, through Millersburg, Sunbury, Williamsport and town of Fasset to the New York State line;

16. From Sunbury through Shamokin to Mt. Carmel.

17. From Sunbury through Roaring Creek, Catawissa and Rock Glenn to Tomhicken;

18. From Catawissa through Nescopec, Moconaqua and Nanticoke to Wilkesbarre;

19. From Nanticoke to Glen Lyon;
20. From Nescopec to Rock Glen;
21. From Montandon through Lewisburg, Spring Mill and Bellefonte to Milesburg;
22. From Lewiston Junction through Lewiston and Selinsgrove to Sunbury;
23. From Lewiston to Logan;
24. From Tyrone through Vail, Milesburg and Lock Haven to Williamsport;
25. From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgway, Rolfe, Johnsonburg, Kane, Sheffield, Warren and Corry to Erie;
26. From Vail to Curwensville;
27. From Keating to Kasthaus;
28. From Philipsburg to Houtzdale;
29. From Snow Shoe Intersection to Snow Shoe;
30. From Ridgway to Falls Creek;
31. From Johnsonburg to Clermont;
32. From Altoona through Hollidaysburg to Williamsburg;
33. From Hollidaysburg to Henrietta;
34. From Cresson to Ebensburg;
35. From Blairsville Intersection through Freeport and Butler Junction to Butler;
36. From Blairsville to Indiana;
50 37. From Butler Junction to Allegheny;
38. From Greensburg through Uniontown to Fairchance;
39. From Uniontown through Brownsville and Monongahela City to Pittsburg;
40. From Chambersburg to Waynesboro;
41. From South Pennsylvania Junction to Richmond Furnace;
42. From Dillsburg Junction to Dillsburg;
43. From Redbank to Oil City;
44. From Millersburg to Williamstown,

and

Resolved, That this company does hereby, in the exercise of the powers aforesaid, appropriate, for the construction and maintenance of said line of telegraph, poles and wires and branches, and as and for the route thereof, so much of the right of way of said lines of railroad owned, leased, controlled, maintained or operated by said Pennsylvania Railroad Company and not in actual use for railroad purposes, and the streets, highways, water, bridges and lands occupied by or upon, over or through which said lines of road run, as is now occupied and used by the existing lines of telegraph poles and wires, as the same is now erected and constructed thereon; and also so much of said right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires thereon over and along the defendant" said railroads, where the said telegraph company now has no existing lines of poles; and which said part of said right of way is hereby declared to be neces-

sary for the construction and maintenance of said line of telegraph poles and wires, the same being so constructed, maintained, and operated on or near the edge of said right of way, as not to
51 interfere with the common use or operation of said line of railroad by said Pennsylvania Railroad Company, and subject to such reasonable changes of location of said poles, at the direction of said railroad company, from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use of and travel upon said railways; and the said telegraph lines and branches are particularly shown and delineated upon a map thereof this day submitted to this committee.

Resolved further, That the map submitted to this meeting is hereby made a part of this resolution and of the resolutions appropriating and condemning the right of way above described; and that the proper officers of the company are hereby authorized and directed to authenticate, by a certificate indorsed upon said map, under the corporate seal of the company, the map presented to and approved by this meeting as part of the proceedings hereof.

Resolved further, That the proper officers of this company are hereby authorized and directed first to acquire the rights of way thus appropriated and condeeemd, by negotiation, purchase, and contract if possible, and if not, then to institute, prosecute and defend all necessary actions *ta* law and in equity, or other proceedings which may be necessary for the a-quisition of the said rights of way, and locate, construct, maintain, operate a line of telegraph thereon, and for these purposes to make, execute, and tender any bond, bonds, or other securities that may be necessary in such legal proceedings, negotiation or contract to acquire said rights of way.

A true copy from the minutes.

[SEAL.] A. R. BREWER, *Secretary.*

52 Extract from minutes of special meeting of the board of directors of the Atlantic & Ohio Telegraph Company, held in the city of Philadelphia, Pa., on October 2nd, 1902.

The president reported to the board that the Western Union Telegraph Company had adopted the following action relating to the acquisition of rights of way along and upon railroads owned, leased, controlled, maintained or operated by the Pennsylvania Company, to-wit:

"The president reported to the committee that he had caused to be prepared a map showing the route of the lines of telegraph poles and wires as now maintained and operated by the company from Philadelphia to Pittsburg, with the branches therefrom as shown upon said map and extending to the boundaries between the State of Pennsylvania and the States of Maryland and New Jersey and to other points within the State of Pennsylvania and located and constructed upon the right of way of the railroad owned, leased, controlled or maintained and operated by the Pennsylvania Railroad Company, and the same was submitted to the committee.

Thereupon and upon motion duly made the following resolution was unanimously passed:

Resolved, That, in the exercise of the power in it vested by virtue of the Constitution and laws of the United States, and of the constitution and laws of the Commonwealth of Pennsylvania, and by virtue of the lease made to it by the Atlantic & Ohio Telegraph Company and the acts of the assembly of the Commonwealth of Pennsylvania ratifying and confirming the same and in the exercise of all and every other power in any wise enabling it so to do, this company does hereby locate a single line of telegraph over and along and upon the right of way of the railroad owned, main-
53 tained or operated by the Pennsylvania Railroad Company and extending from the city of Philadelphia through the counties of Philadelphia, Montgomery, Delaware, Chester, Lancaster, Dauphin, Perry, Juniata, Mifflin, Huntington, Blair, Cambria, Westmoreland and Allegheny, to the city of Pittsburg, in the State of Pennsylvania, and also a single line of telegraph upon, over and along the rights of way of the following branch or connecting railroads owned, leased or controlled, maintained and operated by the Pennsylvania Railroad Company, to-wit:

(1.) From the city of Philadelphia in a northeasterly direction to a point in the center of the Delaware river, opposite Trenton, in the State of New Jersey;

(2.) From the city of Harrisburgh in a southwesterly direction through Mechanicsburg, Carlisle, Shippensburg, Chambersburg, and South Pennsylvania Junction to the Maryland State line;

(3.) From the city of Pittsburg in a northeasterly direction to the town of Driftwood.

(4.) From Lewistown Junction in a northerly direction to the town of Lewistown;

(5.) From Holmesburg Junction to Bustleton;

(6.) From Tioga Station to Mantua, both in the city of Philadelphia.

(7.) From Philadelphia through Morristown, Phœnixville, Reading, Pottsville and St. Clair to New Boston Junction;

(8.) From St. Clair through Mahanoy Plane to Shenandoah.

(9.) From Frazer to West Chester;

(10.) From Downington to New Holland;

(11.) From Pomeroy to the Delaware State line;

54 (12.) From Dillerville through Columbia, York, and Hanover through Littlestown to Maryland State line.

13. From Middletown through Columbia and Peach Bottom to Maryland State line;

14. From Bridgeport through York, Hanover Junction and New Freedom to the Maryland State line;

15. From Marysville through Millersburg, Sunbury, Williamsport and the town of Fassett to the New York State line;

16. From Sunbury through Shamokin to Mt. Carmel;

17. From Sunbury through Roaring Creek, Catawissa and Rock Glen to Tom Hicken;

18. From Catawissa through Nescopec, Moconaqua and Nanticoke to Wilkesbarre;
19. From Nanticoke to Glen Lyon;
20. From Nescopec to Rock Glen;
21. From Montandon through Lewisburg, Spring Hill and Bellefont to Milesburg;
22. From Lewistown Junction through Lewistown and Selins Grove to Sunbury;
23. From Lewistown to Logan;
24. From Tyrone through Vail, Milesburg and *and* Lock Haven to Williamsport;
25. From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgway, Rolfe, Johnsonburg, Kane, Sheffield, Warren, and Corry to Erie;
26. From Vail to Curwensville;
27. From Keating to Kasthaus;
28. From Philipsburg to Houtzdale;
29. From Snow Shoe Intersection to Snow Shoe;
30. From Ridgway to Falls Creek;
31. From Johnsonburg to Clermont;
32. From Altoona through Hollidaysburg to Williamsburg;
33. From Hollidaysburg to Henrietta;
34. From Cresson to Ebensburg;
35. From Blairsville Intersection through Freeport and Butler Junction to Butler;
36. From Blairsville to Indiana;
37. From Butler Junction to Allegheny;
38. From Greensburg through Uniontown to Fairchance;
39. From Uniontown through Brownsville and Monongahela City to Pittsburg;
40. From Chambersburg to Waynesboro;
41. From South Pennsylvania Junction to Richmond Furnace;
42. From Dillsburg Junction to Dillsburg,
43. From Red Bank to Oil City;
44. From Millersburg to Williamstown.

And resolved, That this company does hereby, in the exercise of the powers aforesaid, appropriate for the construction and maintenance of said line of telegraph poles and wires and branches, and as and for the route thereof, so much of the right of way of said lines of railroad owned, leased, controlled, maintained or operated by said Pennsylvania Railroad Company and not in actual use for railroad purposes, and streets, highways, waters, bridges and lands occupied by or upon, over, or through which said lines of road run, as is now occupied and used by the existing lines of telegraph poles and wires, as the same is now erected and constructed thereon; and also so much of the right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires

thereon over and along the defendant's said railroads, where
56 the said telegraph company now has no existing line of poles; and which said part of said right of way is hereby declared to be necessary for the construction and maintenance of said line of telegraph poles and wires, the same being so constructed, maintained and operated on or near the edge of said right of way, as not to interfere with the common use or operation of said line of railroad by said Pennsylvania Railroad Company, and subject to such reasonable changes of location of said poles, at the direction of said railroad company, from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use of and travel upon said railways; and the said telegraph lines and branches are particularly shown and delineated upon a map this day submitted to this committee.

Resolved, further, That the map submitted to this meeting is hereby made a part of this resolution and of the resolutions appropriating and condemning the rights of way above described; and the proper officers of the company are hereby authorized and directed to authenticate, by a certificate indorsed upon said map, under the corporate seal of this company, the map presented to and approved by this meeting as part of the proceedings hereof.

Resolved, further, That the proper officers of this company are hereby authorized and directed first to acquire the rights of way thus appropriated and condemned, by negotiation, purchase and contract if possible, and if not, then to institute, prosecute and defend all necessary actions at law and in equity, or other proceedings which may be necessary for the acquisition of the said rights of way, and locate, construct, maintain and operate a line of telegraph thereon, and for these purposes to make, execute and tender any bond, bonds or other securities that may be necessary in
57 such legal proceedings, negotiation or contract to acquire said rights of way."

It was thereupon, on motion of Mr. George Morrihew, seconded by Mr. A. R. Brewer,

Resolved, That the corporate action aforesaid of the Western Union Telegraph Company be, and the same hereby is ratified, approved and confirmed by this company, and the said corporate action of the said Western Union Telegraph Company is hereby adopted as the corporate action of this company so far as it has power to do so, and said Western Union Telegraph Company is hereby authorized and empowered, so far as this sued company has authority to empower the said Western Union Telegraph Company on behalf this company to acquire for the lines of this company a right of way along and upon all the railroads owned, leased, controlled, maintained or operated by the said Pennsylvania Railroad Company, as set forth in the foregoing resolution.

A true copy from the minutes.

[SEAL.] A. R. BREWER, *Secretary.*

58 Extract from minutes of the board of directors of the Western Union Telegraph Company, meeting held October 15th, 1902.

The president brought to the attention of the board the action taken by the executive committee, at its meeting on October 1st inst., relative to the acquisition of the right to construct telegraph lines along and upon the right of way of the railroads owned and controlled by the Pennsylvania Railroad Company, which action was as follows, to wit:

"The president reported to the committee that he had caused to be prepared a map showing the route of the lines of telegraph poles and wires as now maintained and operated by the company from Philadelphia to Pittsburg, with the branches therefrom, as shown upon said map, and extending to the boundaries between the State of Pennsylvania and the State of Maryland and New Jersey and to other points within the State of Pennsylvania, and located and constructed upon the right of way of the railroad owned, leased, controlled or maintained and operated by the Pennsylvania Railroad Company, and the same was submitted to the committee. Thereupon and upon motion duly made the following resolution was unanimously passed:

Resolved, That, in the exercise of the power in it vested by virtue of the Constitution and laws of the United States, and of the constitution and laws of the Commonwealth of Pennsylvania, and by virtue of the lease made to it by the Atlantic and Ohio Telegraph Company and the acts of the assembly of the Commonwealth of Pennsylvania ratifying and confirming the same, and in the exercise of all and every other power in anywise enabling it so to do, this company does hereby locate a single line of telegraph over and along and upon the right of way of the railroad owned,
59 maintained or operated by the Pennsylvania Railroad Company, and extending from the city of Philadelphia through the counties of Philadelphia, Montgomery, Delaware, Chester, Lancaster, Dauphin, Perry, Juniata, Mifflin, Huntingdon, Blair, Cambria, Westmoreland and Allegheny, to the city of Pittsburg, in the State of Pennsylvania, and also a single line of telegraph upon, over and along the rights of way of the following branch or connecting railroads owned, leased or controlled, maintained and operated by the Pennsylvania Railroad Company, to-wit:

(1.) From the city of Philadelphia in a northeasterly direction to a point in the center of the Delaware river, opposite Trenton, in the State of New Jersey;

(2.) From the city of Harrisburg in a southwestwardly direction through Mechanicsburg, Carlisle, Shippensburg, Chambersburg and South Pennsylvania Junction to the Maryland State line;

(3.) From the city of Pittsburg in a northeasterly direction to the town of Driftwood;

(4.) From Lewistown Junction in a northerly direction to the town of Lewistown;

(5.) From Holmesburg Junction to Bustleton;
(6.) From Tioga Station to Mantua, both in the city of ——
(7.) From Philadelphia through Norristown, Phœnixville, Reading, Pottsville and St. Clair to New Boston Junction;
(8.) From St. Clair through Mahanoy Plane to Shenandoah;
(9.) From Fraser to West Chester;
(10.) From Downingtown to New Holland;
(11.) From Pomeroy to the Delaware State line;
(12.) From Dillerville through Columbia, York, Hanover, through Littletown to Maryland State line;
60 (13.) From Middletown hrough Columbia and Peach Bottom to Maryland State line;
(14.) From Bridgeport through York, Hanover Junction and New Freedom to the Maryland State line;
(15.) From Marysville through Millersburg, Sunbury, Williamsport and the town of Fassett to the New York State line;
(16.) From Sunbury through Shamokin to Mt. Carmel;
(17.) From Sunbury through Roaring Creek, Catawissa and Rock Glen to Tom Hicken;
(18.) From Catawissa through Nescopec, Moconaqua and Nanticoke to Wilkesbarre;
(19.) From Nanticoke to Glen Lyon;
(20.) From Nescopec to Rock Glen;
(21.) From Montandon through Lewisburg, Spring Hill and Bellefonte to Milesburg;
(22.) From Lewiston Junction through Lewistown and Selins Grove to Sunbury;
(23.) From Lewistown to Logan;
(24.) From Tyrone through Vail, Milesburg and Lock Haven to Williamsport;
(25.) From Lock Haven through Renovo, Keating, Driftwood, Emporium, Ridgway, Rolfe, Johnsonburg, Kane, Sheffield, Warren, and Corry to Erie;
(26.) From Vail to Curwensville;
(27.) From Keating to Kasthaus;
(28.) From Philipsburg to Houtzdale;
(29.) From Snow Shoe Intersection to Snow Shoe;
(30.) From Ridgway to Falls Creek;
(31.) From Johnsonburg to Clermont;
(32.) From Altoona through Hollidaysburg to Williamsburg;
(33.) From Hollidaysburg to Henrietta;
61 (34.) From Cresson to Ebensburg;
(35.) From Blairsville Intersection through Freeport and Butler Junction to Butler;
(36.) From Blairsville to Indiana;
(37.) From Butler Junction to Allegheny;
(38.) From Greensburg through Uniontown to Fairchance;
(39.) From Uniontown through Brownsville and Monongahela City to Pittsburg;
(40.) From Chambersburg to Waynesboro;

(41.) From South Pennsylvania Junction to Richmond Furnace;
(42.) From Dillsburg Junction to Dillsburg;
(43.) From Red Bank to Oil City.
(44.) From Millersburg to Williamstown; and

Resolved, That this company does hereby, in the exercise of the powers aforesaid, appropriate, for the construction and maintenance of said line of telegraph poles, and wires and branches, and as for the route thereof, so much of the right of way of said lines of railroad owned, leased, controlled, maintained or operated by said Pennsylvania Railroad Company and not in actual use for railroad purposes, and the streets, highways, waters, bridges and lands occupied by or upon, over, or through which said lines of road run, as is now occupied and used by the existing lines or telegraph poles and wires, as the same is now erected and constructed thereon; and also so much of the right of way of the said railroad company as may be necessary to enable the Western Union Telegraph Company to locate, maintain and operate a single line of poles and telegraph wires thereon over and along the defendant's said railroads, where the said telegraph company now has no existing line of poles; and which said part of said right of way is hereby declared to be necessary for the construction and maintenance of said lines of
62 telegraph poles and wires, the same being so constructed, maintained and operated on or near the edge of said right of way as not to interfere with the common use or operation of said lines of railroad by said Pennsylvania Railroad Company, and subject to such reasonable changes of said poles, at the direction of said railroad company, from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use of travel upon said railways; and the said telegraph lines and branches are particularly shown and delineated upon a map this day submitted to this committee.

Resolved further, That the map submitted to this meeting is hereby made a part of this resolution and of the resolutions appropriating and condemning the rights of way above described; and the proper officers of the company are hereby authorized and directed to authenticate, by a certificate indorsed upon said map, under the corporate seal of this company, the map presented to and approved by this meeting as part of the proceedings hereof.

Resolved further, That the proper officers of this company are hereby authorized and directed first to acquire the rights of way thus appropriated and condemned, by negotiation, purchase and contract, if possible, and if not, then to institute, prosecute and defend all necessary actions at law and in equity, or other proceeding which may be necessary for the acquisition of the said rights of way, and locate, construct, maintain, and operate a line of telegraph thereon, and for these purposes to make, execute, and tender any bond, bonds, or other securities that may be necessary in such legal proceedings, negotiation or contract to acquire said rights of way."

63 On motion it was

Resolved That the action of executive committee and the resolutions passed by it be and the same are hereby ratified, approved and confirmed, and each and every of the foregoing resolutions is hereby adopted and passed by this board the same as if the said resolution had been originally presented to and acted upon by this board, and the said resolutions are hereby made in all respects the action of this board.

A true copy from the minutes.

[SEAL.] A. R. BREWER, *Secretary.*

EXHIBIT 3.

To the Pennsylvania Railroad Company:

The Western Union Telegraph Company, acting for itself, and as operator of the Atlantic & Ohio Telegraph lines, having this day requested a price for privileges appropriated in behalf of itself and the Atlantic & Ohio Telegraph Company, as specified in a written request accompanied by copies of the resolutions appropriating rights and privileges sought to be acquired, and the Pennsylvania Railroad Company having this day refused to name such a price, the Western Union Telegraph Company respectfully tenders a bond in which it is principal and the American Surety Company of New York is surety, in the sum of one hundred thousand dollars ($100,000), to secure to the Pennsylvania Railroad Company and to the corporations owned, controlled and operated by it, any compensation or damages to which it or its leased or operated companies might be entitled, which may be agreed upon or determined in any legal proceedings prosecuted to ascertain the same. Dated, November 11th, 1902.

THE WESTERN UNION TELEGRAPH COMPANY,
By R. C. CLOWRY, *President.*

64 Know all men by these presents, that the Western Union Telegraph Company, principal, and the American Surety Company, surety, both said companies being corporations existing under and by virtue of the laws of the State of New York, (hereinafter called obligors) are held and firmly bound unto the Pennsylvania Railroad Company, a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania (hereinafter called obligee) in the sum of one hundred thousand dollars ($100,000), to be paid said obligee, its certain attorney, successors and assigns, to which payment well and truly to be made, said obligors bind themselves, and each of them, their respective successors and assigns, jointly and severally, firmly by these presents.

Witness the respective common and corporate seals of the said obligors, duly affixed hereto and attested by the signatures of their respective presidents and secretaries, or attorneys, the first day of

October, in the year of our Lord, one thousand nine hundred and two.

Whereas, said The Western Union Telegraph Company, obligor above named, has been and is now operating line of telegraph for public use, by and with the consent of the said obligee, and other railroad corporations owned, leased, controlled or operated by said obligee, upon and along the rights of way and properties of said obligee, and the railroad corporation aforesaid, and is desirous of continuing to maintain and operate said lines of telegraph, upon and along said rights of way and properties, to the end that said line of telegraph may be maintained and operated by said obligor perpetually upon and subject to the conditions and regulations that may be imposed upon said obligor in the use and occupation of said properties and rights of way, as may be imposed according to law, but otherwise to be free from the control of said obligee; and

Whereas pursuant to said corporate rights and franchises
65 vested in said principal obligor by law, it has, by due corporate action, located certain lines of telegraph and the necessary space for their maintenance and operation along and upon the rights of way and properties of said obligee and the railroad corporations owned, leased, controlled or operated by it, as aforesaid, as specified and described in and by "Schedule A," attached hereto, and shown upon the map forming part thereof, both said schedule and said map being specially made part hereof.

Now the condition of this obligation is such, that if said obligors, or either of them, shall pay or cause to be paid to said obligee such damages accruing by reason of the entry upon, use, occupation and appropriation of the right to construct, maintain and operate said lines of telegraph, together with the necessary space and land for their construction, maintenance and operation as may be agreed upon by said principal obligor and said obligee, or as may be awarded in proceedings to ascertain said damages according to law, then this obligation to be void, otherwise to be and remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,

(Signed) By ROBERT C. CLOWRY, *President.*

[SEAL.]

Attest:

(Signed) A. R. BREWER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,

[SEAL.] By DAVID B. SICKELS, *Vice President.*

Attest: CORTLAND S. VAN RENSSELAER, *Attorney.*

66 STATE AND COUNTY OF NEW YORK, *ss:*

On this 1st day of October, 1902, before me personally appeared David B. Sickels, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one ef the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice president.

(Signed) K. J. PIERCEY,
[SEAL.] *Notary Public, Kings County, No.* 5.

Certificate filed in New York Co.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other
67 than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of its attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cor-landt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and seal of the company at the city of New York, this 1st day of October, 1902.

(Signed) [SEAL.] CORTLANDT S. VAN RENSSELAER,
Attorney.

EXHIBIT No. 4.

To the Pennsylvania Railroad Company:

Please take notice: That the Western Union Telegraph Company will, on the 20th day of November, 1902, present the bond tendered this day to the Pennsylvania Railroad Company, in the sum of one hundred thousand dollars ($100,000), with the American Surety Company of New York as surety thereon, to the circuit court of the United States at Pittsburgh, State of Pennsylvania, for approval.

Dated Philadelphia, Penna., Nov. 13th, 1902.

THE WESTERN UNION TELEGRAPH COMPANY,
By H. D. ESTABROOK, *Its Solicitor.*

68 *Opinion.*

BUFFINGTON, *J.*:

This opinion concerns two cases brought in this court by the Western Union Telegraph Company against the Pennsylvania Railroad Company; one, a petition on the law side to condemn part of the railroad's right of way and appropriate it to telegraph purposes; the other, a bill on the equity side praying for an injunction to restrain the railroad from dispossessing the telegraph company during the pendency of said condemnation proceedings. Briefly summarized, the relations of the parties are as follows: The Atlantic & Ohio Telegraph Company is a corporation chartered by the State of Pennsylvania. On June 20, 1864, it entered into a contract with the Pennsylvania Railroad Company, whereby the latter granted permission to the telegraph company to place a telegraph line on the railroad's right of way. On April 15, 1864, the Atlantic & Ohio Telegraph Company had leased to the Western Union Telegraph Company, a corporation of the State of New York, all its property for ten years, the lease to be terminated after that time by either party on six months' notice. Thereafter the Western Union Telegraph Company operated the Atlantic & Ohio's telegraph lines on the railroad right of way. On September 20, 1881, the Western Union Telegraph Company and the Pennsylvania Railroad Company entered into a new contract covering this telegraph line. This contract was for twenty years, at the end of which time it could be terminated by the railroad on six months' notice. On May 15, 1902, the railroad gave the telegraph company notice of the termination of the lease and to remove its lines on December 1, 1902. On November 26, 1902, the Western Union Telegraph Company brought its petition and bill in equity in this court as noted above. As the

two are inter-related, we will dispose of the questions arising
69 under each in one opinion, which may be considered as filed in each case. We first take up the petition.

By it the Western Union Telegraph Company seeks to condemn and appropriate to its use for telegraph purposes a strip of ground located on the right of way of the Pennsylvania Railroad from Pittsburgh to Philadelphia, and upon numerous branches or connecting side lines as well. The total appropiation thus sought, indicated by an accompanying map, covers upwards of fifteen hundred miles of railroad right of way. The petition prays that this court approve a tendered bond in the sum of $100,000.00 and order the same to be filled "for the use and benefit of the Pennsylvania Railroad Company in its own behalf, and as the owner, leasee or operator of the railroads over whose properties the rights of way sought to be appropriated by the Western Union Telegraph extend;" that proceedings be had to determine the compensation to be paid; that upon payments of said sum into court or to the railroad, possession be adjudged of said "use, rights and interests;" and that the "title to the said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company."

An examination of the prayers of this petition in connection with the resolutions of the Atlantic & Ohio Telegraph Company and those of the Western Union Telegraph Company, its lessee, and in pursuance of which resolutions this proceedings is begun, shows that what if here sought to be appropriated is the ownership of, and title to, a part of the ground constituting the general right of way of the railroad company.

It is true there is, in the resolutions, a clause stating that what is appropriated shall be "subject to such reasonable changes of location of said poles, at the direction of said railroad company from time to time hereafter, as may be necessary to prevent said telegraph line from interfering with the ordinary use and travel upon said railways."
70 We find no statutory provision or limitation for a condemnation of land which subjects it to such shifting and transient ownership and occupation as above suggested. If the petitioner is entitled to condemn and appropriate, it would seem it is entitled to have and to hold what it acquires and pays for. But it is, in any view, clear that this clause, if enforcible, would only permit the railroad to shift upon, but never remove from, its right of way the telegraph lines of the appropriating company. If the railroad's future needs should demand the occupation hereafter of the whole of its present right of way for additional tracks, or if its own telegraphic necessities required it to duplicate on the north side the private telegraph lines it now has on the south side of its right of way, it is evident that it could not exclude from such the north side, or at all events from its right of way generally, a telegraph company that had condemned and acquired what is here sought. Whether then, the land appropriated be a definite, fixed line, or a shifting strip subject to re-location by the railroad, it is certain it is some part of the railroad's right of way and that to such part the

telegraph company would acquire exclusive adverse ownership. Indeed, as we have seen, this is the object sought, viz: that "the title to said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company." And that a fixed location is in effect sought under this proceeding is shown in the prayer of the bill in equity for a permanent injunction: "that upon due payment of such compensation by your orator to the defendant, this court will order, adjudge and decree that your orator is entitled to a perpetual injunction against the defendant herein restraining it from in any manner interfering with the location, construction, maintenance and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendant." Under any view, as to the part so taken and occupied, even for the time being by the petitioner's poles, the railroad is excluded
71 from the use thereof for its tracks, for its own telegraph lines and for the lines of other telegraph companies whose tenancies might be highly remunerative and desirable, or whose facilities would substantially aid in the transaction of the railroad business.

This question of the future needs of the railroad, its unhampered control and sole use of its right of way, to enable it to fully perform its public duty of a common carrier, is one of grave importance. A railroad's right of way is the artery of its life; its acquisition and construction difficult and costly; the extent to which it can be used for additional track room the limit of the railroad's development. In taking from it any part of such ground, due regard should, therefore, be had to its future needs. It was well said by Judge McKennen in a case in this court, later referred to, "Every reasonable intendment must be made in favor of the primary rights of the complainant (in that case a railroad seeking to prevent part of its right of way being re-appropriated). * * * No actual encroachment upon these rights can be sanctioned or allowed; and in measuring there extent there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business." We deem the questions therein mentioned as to the future needs of a railroad in fulfilling its chartered purpose such as should receive thoughtful regard and due consideration before it is deprived of any part of its right of way.

Now whatever the scope of the appropriation sought, and however the ownership thereof may be possibly qualified under the clause relating to re-location, it is clear that what is sought is an adverse, *in invitum* appropriation covering many hundred miles of railroad property, and that "the title
to said rights and interests, as against the defendant,
72 thereby vest in the said Western Union Telegraph Company." Indeed, the absolute and exclusive character of telegraph appropriation, with reference to a street, and the same may be said, *mutatis mutandis*, to the occupation of a railroad, is

stated by the Supreme Court of the United States in St. Louis *vs.* Western Telegraph Co., 148 U. S. 92: "But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies for transportation of messages."

The present question of the filing and approval of the bond tendered is on the surface of seemingly small import and might be regarded as a formal preliminary step in a legal contest. In reality, under the Pennsylvania decisions, as applicable to the facts of this case, approval by the court of the bond vests in the appropriating company as clear and perfect a title to the easement sought as though it had been bought and paid for. As was said in Hoffman's Appeal, 118 Pa. St., 512: "The privilege of taking private property for public use may, therefore, be constitutionally exercised by those invested therewith in one of two ways; either by actual payment or by giving security for the payment of compensation to the owner of the property taken. For example, if a railroad company agrees with and pays the landowner for right of way, it thereby acquires a clear right to the easement.

On the other hand, if the parties fail to agree, the same right
73 may be acquired by complying with the other constitutional alternative, viz: giving security for the payment of just compensation, in the manner prescribed by law. When the latter alternative is resorted to, and sufficient bond, with sureties approved by the court, has been given, the company acquires as clear and perfect right to the easement as if it had paid therefor in cash" The approval of this bond being then a decree which adjudges the right of the petitioner to take and the duty of the railroad to surrender, and being in substance a compulsory judicial conveyance to the telegraph company of title to property which may prove indispensable to the future needs of the present railroad owner, the duty, indeed, the obligation, resting upon a court, to be well assured of its right so to do, before taking such a far-reaching and irretrievable step, is apparent.

Now, the land here sought to be appropriated is to be regarded in two different relations: one public; the other private—for while it is private in ownership, it is public in use and duty. As constituting a part of a railroad right of way, it is by Federal as well as State law, and decision deemed a public highway, and as such dedicated or set apart to a public use. The constitution of Pennsylvania, art. 17, sec. 1, says: "All railroads and canals shall be public highways, and all railroad and canal companies shall be common

carriers;" and by the act of Congress of June 8, 1872, 17 Statutes at Large, 308, sec. 201, it is provided: "That all railways and parts of railways which are now or may hereafter be put in operation, are hereby declared to be post-roads." "The question," says the Supreme Court of the United States (Cherokee Nation *vs.* Kansas Railway Company, 135 U. S., 657,) "is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends."

74 But not only is a railroad made a public highway, but under the laws of Pennsylvania, land of a railroad or other corporation, necessary to the full enjoyment and exercise of a public use, is by virtue of being dedicated to such use, excepted from some of the liabilities incident to private property, in being exempt from levy and sale and incapable of corporate alienation, unless such power of alienation is conferred by the State. This "exemption," as it is said in Plymouth R. Co. *vs.* Colwell, 39 Pa. St., 339, "rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold land was conferred that these objects might be worked out." Such limitation exists not by reason of corporate ownership; Twelfth Street Market Co. *vs.* Philadelphia & Reading Terminal R. Co., 142 Pa. St., 580; but because of the public right to the public use, which ordinarily cannot be gainsaid or withdrawn by the owner.

But while the use to which such property is subjected is public, yet ownership thereof remains private. Thus Mr. Justice Grier, in Rundle *vs.* Delaware & R. Canal Co., 1 Wallace, 275, 21 Fed. Cases, p. 11, says: "In the popular meaning of the term nearly every corporation is public, inasmuch as they are all created for the public benefit. Yet if the whole interest does not belong to the Government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus all bank, bridge, turnpike, railroad and canal companies are private corporations. In these and other similar cases, the uses may in a certain sense be called public, but the corporations are private, as much so as if the franchises were vested in a single person. Dartmouth College *vs.* Woodward 4 Wheat. (17 U. S.) 669." Freeman on Executions, sec. 126*a*, says: "The property of certain *quasi*

75 public corporations is held by them for the purpose of private gain, and has so far as its ownership is concerned, all the advantages of private property."

Seeing then that what is here sought to be appropriated is not only private property and of great value to its private owners, but that it is impressed with a Federal obligation and public use as a Federal post road, and with a State one as a highway and common carrier, it is evident that the right of the petitioner to divest private ownership and divert public use must be clear and free from uncertainty. Such right the petitioner claims to have by virtue of a power of eminent domain in it vested, first by the act of Congress of

July 24, 1866, and secondly by the constitution and statutes of Pennsylvania. Whether such powers and rights are so vested constitutes the underlying question of this case; but before considering it we deem it proper, so far as concerns the petition to condemn, to refer to and dispose of some other phases of this controversy.

At the argument it was contended on behalf of the railroad, *inter alia*, that such right of eminent domain as a telegraph company could exercise in Pennsylvania was confined to corporations chartered by that State; that whatever right was exercisable in the present case could be exercised only by the Atlantic & Ohio Telegraph Company, a Pennsylvania corporation, the lessor of the Western Union Telegraph Company; that the former company was a necessary but nonjoined party in the petition and that if made a party therein the jurisdiction of this court would be ousted; that the Pennsylvania Railroad Company, having its principal offices and being located in the eastern district of Pennsylvania, could not be sued in this case in the western district; that the present application to file and approve the bond was not a suit of action of law of which this court had jurisdiction, and that the right of eminent domain could only be exercised after a bond had been filed and approved in the State court in accordance with the Pennsylvania statutes. It is obvious, however, that unless the right of eminent domain is vested in the petitioner it will not be necessary to pass upon these and other questions involved. We will, therefore, for present purposes, assume, without deciding, that all these questions are with the petitioning company and address ourselves to those of alleged Federal and State rights of eminent domain.

76

It is also proper to here remark that this proceeding to condemn is in no wise affected by the past or present relations between the Western Union Telegraph Company and the Pennsylvania Railroad Company. By the contract of September 20, 1881, noted above, the Pennsylvania Railroad Company granted to the Western Union Telegraph Company the "right to place, maintain and use upon the line of the right of way of the Pennsylvania railroad and of the railroads owned, operated or leased by it * * * a single line of telegraph poles * * * with the privilege of erecting and maintaining thereon such number of wires as the telegraph company may from time to time elect, said line to be located and placed under the direction of the general manager of the railroad company." It provided for the payment of an annual rental by the telegraph company; it was "to continue in force for and during the term of twenty years" from its date; and the telegraph company should "at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of said notice all of its poles and wires * * * and if not so removed, the railroad company may remove them at the expense of the telegraph company." It also provided that: "any easement or right of way heretofore acquired by the telegraph company upon any of the

roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and ease-
77 ments of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination."

Now whatever may have been the prior rights of the Western Union Company, which as noted above it expressly surrendered, it is clear its possession of the railroad property when this petition was filed was under the contract of September 20, 1881. That contract created a rental relation. As stated in St. Louis *vs.* The Western Union Telegraph Company, *supra*, it was "in the nature of a charge for the use of the property * * * that which may properly be called rental." Having entered into a contract of tenancy and its possession of the *locus in quo* being under an expressed covenant and an implied obligation to surrender at the termination of the tenancy, it is clear, as shown later in this opinion, that the tenant can avail itself of no pre-existing adverse rights to defeat the owner's dominant title. Nor can any rights enjoyed by the tenant under the lease and pursuant thereto be made a ground for denying the landlord the implied and covenanted right to have possession yielded and his dominant estate restored. In view, therefore, of the tenancy of the Western Union Telegraph Company under this contract; of the well recognized legal duty and "implied obligation on the part of the tenant to re-deliver the possession of the demised premises to his landlord upon the expiration of his term," 18 Amer. & Eng. Ency. of Law, p. 403; and of the express provision for surrender, the petition of the tenant, The Western Union Telegraph Company, to appropriate by eminent domain the property of its railroad landlord, should be treated as one wholly independent of the question of tenancy. If it be vested with the right of eminent domain, that right is neither dependent upon, increased by, or detracted from by its tenancy. In other words, while the right of the telegraph company to begin, during the
78 tenancy, a proceeding to condemn the demised premises, may for present purpose be assumed, it is equally obvious that such proceeding must stand wholly on the right to condemn, and that no rights or equities to such adverse proceeding can be based on the servient contract relation of tenancy under which the petitioner is in possession. The right, therefore, of this petitioner to appropriate by eminent domain will be considered precisely as in the case of any third corporation vested with the petitioner's corporate rights, seeking like relief. It is obvious also the suggestion that some permanent right was vested in the Atlantic & Ohio Telegraph Company, under the prior contract, does not affect this petition to condemn. The resolution of that company approving the resolutions of the Western Union Telegraph Company to appropriate by condemnation this right of way, is based on the implied assumption of

ownership by the railroad of the property so sought to be appropriated. It is a resolution to acquire, by virtue of the public right of eminent domain; not to enforce or suggest any private right or claim. It is obvious, therefore, that the averment of possible right in the Atlantic & Ohio Telegraph Company has no pertinency to this petition.

Another preliminary matter should be referred to. The Pennsylvania Railroad Company, prior to the beginning of this proceeding, entered into a contract with the Postal Telegraph-Cable Company, dated June 25, 1902, whereby the railroad in substance agreed, in consideration of certain rentals, to furnish that company with pole facilities upon its right of way for fifteen years, and permit the telegraph company to use the same for its wires. Inasmuch as the private telegraph lines of the railroad now occupy the south side of its right of way, and to furnish the pole facilities provided for in this contract the railroad intends to place poles owned by itself on the north side and occupy the location now used by the
79 Western Union Telegraph Company, it is contended the contract in question violates art. 16, sec. 12, of the constitution of Pennsylvania, which provides: "No telegraph company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph company owning a competing line or acquire, by purchase or otherwise, any competing line of telegraph." This clause has no reference to this case. Certain it is by this contract the Postal Telegraph-Cable Company did none of the acts thereby inhibited. It has not consolidated with the petitioning company, it has no proven controlling interest in its stock or bonds, nor has it acquired by purchase or otherwise, any competing line. It further appears the railroad company notified the Western Union Telegraph Company to remove all of its poles, wire and property from its right of way, so that neither directly or indirectly is it proposed that the Postal Telegraph-Cable Company shall in the fulfillment of this contract, "acquire, by purchase or otherwise, any other competing line of telegraph." Moreover, it is apparent that the validity or non-validity of such contract can in nowise affect the question whether prior legislation vests the right of eminent domain in this petitioner.

Turning then to the underlying question, let us ascertain what powers of eminent domain, State or Federal, are vested in the petitioning company. Eminent domain is one of the highest attributes of sovereignty. By it the sovereign power, State or Federal, is enabled to take private property and appropriate it to public use. But subject to this sovereign power, private ownership is absolute, and such absolute ownership is safeguard- by a two-fold constitutional protection, viz.: it can only be taken away by due process of law and then on payment of just compensation. Amendment V of the Constitution of the United States provides: "No person shall * * * be deprived of life, liberty, or property, without
80 due process of law; nor shall private property be taken for public use, without just compensation."

It is also true that the sovereign State or nation can, by virtue of its superior dominion or eminent domain, reappropriate to an additional or secondary public use property it has once set apart to public use. For it must be apparent that the sovereign power cannot by dedicating property to one use preclude itself from rededicating the same property to some other public need. To do so were to defeat the purpose for which alone sovereignty exists—to promote the public good; *salus populi est suprema lex.* It will, therefore, be apparent that the Federal Government in promoting Federal constitutional powers and the State in its sphere have the sovereign right to appropriate private property to public use and to reappropriate property once set apart to public uses to other and additional ones.

Now, as a telegraph line is a recognized factor of commerce (Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, 96 U. S., 1), and therefore a public use, the right of the nation and State to exercise the power of eminent domain to appropriate property for telegraph purposes is clear. But while the right is undoubted, its enforcement affects the otherwise absolute right of private property, protected, as we have seen, by constitutional safeguards. The right to take, *in invitum*, the property of the subject is the most absolute power of sovereignty; the surrender of ownership, the abridgement of fundamental and constitutional right. It is manifest, therefore, that one who claims a delegated right to exercise this sovereign power must show a clear right, and that whatever is not expressly given or *ex necessitate* implied must be deemed withheld. And where not only private property but public uses are affected, the right to appropriate should be certain in that regard.

Inhabitants of Springfield *vs.* Connecticut River R. Co., 4
81 Cush., 73; In the matter of the City of Buffalo, 68 N. Y. 171;
In the matter of the Boston & Albany Railroad Co., 53 N. Y.
577.

Let us then inquire whether Congress has delegated the power of eminent domain by the act of July 24, 1866. Sec. 1 of that act, 14 Statutes at Large, 221, now embodied, though not in exact words, in sections 5263 and 5264 of the Revised Statutes, enacts: "That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of

telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres to each station; but such stations shall not be within fifteen miles of each other." The declared object of this act is to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." These expressed purposes are fulfilled by the act, even if the right of eminent domain is not delegated. The statute was passed at a time when transcontinental rail and telegraph lines through the public domain were in construction or contemplation.

82 No special ground calling for legislation so far as existing lines of railroad were concerned, is shown to have then existed. Indeed, the record in this case shows that both prior thereto and since, railroad companies were contracting with telegraph companies, in order to secure the installation of telegraphs along their lines as a help to railroad operation. Material property, and aid by way of privilege, were given by the Government in the right to "construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States" and "over, under or across the navigable streams or waters of the United States;" in the free right to use necessary stone, timber and other materials from the public land, and to pre-empt forty acres of land for each station. An inter-state franchise, free from State interference, was conferred in the right "to construct, maintain and operate lines of telegraph * * * over and along any of the military or post-roads of the United States, which may have been or may hereafter be declared such by act of Congress;" Pensacola Telegraph Co. *vs.* The Western Union Telegraph Co., *supra*. It will, therefore, be seen that in these substantial and valuable property and franchise rights the expressed purposes of the act were fulfilled, and there is no necessity to superadd the right of eminent domain. Such grant is not essential to the enjoyment of the franchise conferred. Moreover, since the constitutional inhibition to which reference has been made, provides that "No person shall * * * be deprived of * * * property without due process of law; nor shall private property be taken for public use, without just compensation," thus coupling the right to take by "due process of law" with the render of just compensation of, it would seem that if Congress intended by this act to empower the taking of private property, it would have made provision for ascertaining compensation. In the absence of any imperative demand for an implied grant of the right of eminent domain, the omis-

83 sion of provision for compensation is an argumentative, if not, indeed, a cogent, reason for concluding that no grant of the right to take private property was contemplated. Provision for compensation may imply power to take: Linton *vs.* Sharpsburg Bridge Co., 1 Grant (Pa.) 415; absence thereof suggests no power to take was intended: Chamberlain *vs.* Elizabeth, 41 N. J. Eq., 43. Moreover, the express grant of public, and the non-refer-

ence to private property is pregnant proof that private property rights were not meant to be affected: mention of the one was the exclusion of the other. In Murphy *vs.* Kingston, etc., R. Co., 11 Ont. Rep., 582, it was held that Statute *vs.* Victoria, c. 64 (D), which empowered a railroad company "to own and hold land in any municipality through or in which the main line or any branch was carried, for the erection and maintainance thereon of stations, sidings, etc., as might be necessary for the purpose of the company" did not empower them to appropriate against the will of the owner.

There being no express grant of the right of eminent domain in this act, as it is clear there is no implied one. The grant, outside of Federal property was, as we have seen, "to construct, maintain and operate lines of telegraph * * * over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress." While it is true that a right to condemn may be implied of necessity when the grant itself would be defeated unless such power were implied, yet such necessity is one arising not from the act of the party seeking to avail himself of the right, but from the law itself; it is one proceeding from the nature of things, over which the party has no control, and not from mere convenience or economy: Lewis on Eminent Domain, sec. 240.

Now the conformation of a country in the way of defiles, rock formation and streams might be such that two authorized
84 roads—rail, highway or turnpike—would be physically required to use in common a sole permissible grade and location, or be compelled to make an unreasonable detour. But grade is not a necessary factor in telegraph construction. There is no physical reason why a telegraph company cannot as well use for its lines a strip of land along, or within reasonable reach of a roadway or railroad as place them upon the particular ground already appropriated by such road. Such being the case, it is manifest that an attempt by a telegraph company to use the entire length of a railroad for its lines, as it is here sought to be done, is not based upon imperative necessity, without which its grant "to construct, maintain and operate" would be defeated, but that such proposed location is a matter of economy and convenience. It is clear, therefore, that from the nature of things, no implied grant of a Federal power of eminent domain is essential to the enjoyment of the franchise conferred by this act. Indeed the case of The Pensacola Telegraph Co., *vs.* The Western Union Telegraph Co., referred to above, notably illustrates the efficacy of the act to secure to a telegraph company, even against hostile legislation, full enjoyment of the right to operate its lines "over and along any of the military or post roads of the United States," without delegation of the right of eminent domain.

Out of deference to the earnest argument of counsel representing the telegraph company, who contend the construction of the act of 1866 in that regard is an open one, we have discussed it as such and indicated our independant views. But as we read the decisions, we think the question has been settled by the

Supreme Court of the United States. This statute first came before that tribunal in Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, *supra*. An examination of that case shows that its construction was there involved. The appellant, in the argument of counsel, contended the statute
85 simply conferred on telegraph companies "a right of way over the public domain;" then it extended "only to such military and post-roads as are upon the public domain," and, therefore, had no application to the case in hand, that of a telegraph line constructed on a railroad not on a public domain. The court, however, held the act extended to military and post roads generally, in addition to those on the public domain, but that no attempt was made thereby to confer rights to private property. In defining what the law did provide and mean, the court, to meet criticism of it, stated what it did not provide. It showed it extended to all military and post roads of the United States, and, therefore, to the railroad on which the telegraph in controversy was located, but that it did not affect private property. It was there said by Chief Justice Waite: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is acquired, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

In the case of The Western Union Telegraph Company *vs.* Ann Arbor R. R. Co., 178 U. S., 243, the construction placed upon the statute in the Pensacola case was restated and approved. The right of the telegraph company in the Ann Arbor case to a review by the Supreme Court was in question, and such right depended on the existence of a Federal question. In the complaint in the State court, where the case was originally brought, the allegation of the bill was that the telegraph company had accepted the provisions of the act in question, and that independent of the contract made with the railroad it had "a right to maintain its telegraph line on what
86 was formerly said Frankford and South Eastern railroad under the provisions of the statute of the United States." If this allegation of a property right, independent of the contract, and based on the provisions of the act of 1866, did not as the court said "really and substantially involve a dispute or controversy as to the effect and construction of the Constitution or laws of the United States, upon the determination of which the result depends," then it was "not a suit arising under the Constitution or laws," and the judgment of the State court was not reviewable by the Supreme Court. It was accordingly held that the cause of action was one based on contract, and that the construction of the act of 1866 was not involved, and the judgment not reviewable. As we read the decision one reason why the complaint could not be regarded as raising a Federal question was that the court would not, in view of its con-

struction of the statute in the Pensacola case, permit it to be asserted as a ground of Federal jurisdiction. In that regard, the court, speaking by Chief Justice Fuller, said: "It has long been settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; 'but it does provide, that, whenever the consent of the owner is obtained no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporation as are willing to avail themselves of the privileges.' Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, 96 U. S. 1. * * * As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a construction to be raised as a basis of jurisdiction."

87 If the construction thus given this statute is the supreme law of the land and binding upon all inferior tribunals, as it unquestionably is, we must hold, as we do, that the act of 1866 does "not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business," and no such Federal right of eminent domain as this particular petitioner claims is vested in it thereby.

We next inquire whether a right of appropriation is vested in the Atlantic & Ohio Telegraph Company, the lessor of the Western Union Telegraph Company, by the constitution and statutes of Pennsylvania. As stated above, we have assumed for present purposes that any right of eminent domain possessed by the Atlantic & Ohio Telegraph Company is vested in the Western Union Telegraph Company. What, then, are the terms of the statutory and constitutional grant to the former company, and what is the construction given such grants by the supreme court of Pennsylvania? Is the Atlantic & Ohio Telegraph Company authorized to appropriate land already appropriated for use as a railroad right of way? The Pennsylvania act of March 24, 1849, incorporating that company constitutes it a body corporate "for the purpose of making, using and maintaining telegraph lines and communication by one *or more routes* between the cities of Philadelphia and Pittsburg and intermediate places." By certain other legislation; not necessary to here specify, it was empowered "to purchase, make, use and maintain any connecting or side lines." It should be noted in passing that the route between Philadelphia and Pittsburgh, the termini of the charter, covers some three hundred and fifty miles of the total right of way sought to be appropriated. Section V of the charter provides: "That it shall and may be lawful for the said corporation hereby created, to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within this State; the said works to be so placed as not to interfere with the common use of such roads, high-

88 ways, streets and waters." It further provides that: "The said corporation and all other persons by them authorized,

appointed or employed, shall have power and authority to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing the said telegraph lines, and using, repairing, maintaining and enjoying the same, upon which the same may be located, or which may be necessary or convenient for the location of the same."

Now, this section it will be observed, consists of two parts. The first makes it lawful for the corporation to construct "along and across any of the roads, highways, streets, and waters within this State;" the second confers power and authority "to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing the said telegraph lines, and using, repairing, maintaining and enjoying the same, upon which the same may be located, or which may be necessary or convenient for the location of the same." Several things are clear in the construction of this early statute, for it was passed in the early stage of both railroad and telegraph development. As the act contemplated the construction of one or more routes between the cities of Philadelphia and Pittsburgh, there was no implication that any one route was essential to the enjoyment of the franchise to construct. Not only is no mention made of a railroad or railway in the act, but it was not until a later period that these charter termini were connected by rail. But when the charter was granted the two cities named were connected by systems of public roads or highways. It is obvious, therefore, that in the grant of a corporate franchise to construct one or more routes, the legislature did not contemplate the then use of railroads, for there was then no such connecting railroad line, but provided other means by which one or more routes could be secured across the State and fully enjoyed. These means consisted in the free grant—for no provision was made for compensation therefor—"along and across any of the roads, high-
89 ways, streets and waters within this State;" and the other in the power "to enter into and upon, hold, occupy and enjoy any land for the purposes," etc., making compensation, of course, to the owner. It will thus be seen that the purpose of the grant could be fulfilled without embracing railroads. They are not mentioned, and very probably were not at that early day meant to be included in the general terms, "roads, highways and streets." At that time no legislation in Pennsylvania defined them as highways, and the context shows that the roads, highways and streets contemplated were such as were open to common use, *i. e.*, the public property, for it was enacted that the telegraph was to be placed so as "not to interfere with the *common use* of such roads, highways, streets and waters." Evidently this language referred to public property of a kind the public had a common right to use. While a railroad is a public highway in the sense it is a common carrier and has a public use to fulfil, yet it never becomes a public highway in the sense it is subject to common use. It is public in the common duty it owes the public, but private in operation and use to fulfil such duty. The authorities are clear that the public cannot make common use

of it as a public passage way, and that one doing so subjects himself to the liability of a trespasser: The Philadelphia & Reading Railroad Company *vs.* Hummell, 44 Pa. St. 378.

The most that can be said of this charter is that it leaves it a debatable question whether it extends to railroads. We have seen it does not by express words; we have seen it expressly grants the privilege of entering upon certain property already subjected to a public use and its mention of specific kinds of such public uses as rights of way upon which the telegraph company might enter, implies non-inclusion of property in other and different kinds of public use; we have seen that the use of a railroad was neither essential to the enjoyment of the franchise, and that ex-
90 press provision was made for its enjoyment in other ways. It would seem, therefore, that neither in express terms or by imperative indication to fulfill the charter object, is the right to enter upon a railroad given by this charter, and that a power to appropriate railroad property was not essential to the franchise to construct a telegraph line between Philadelphia and Pittsburg is evidenced by the charter. Indeed, that instrument itself shows that prior to its grant, and therefore without its aid or the exercise of the power of eminent domain, there was, vid-sec. 2 of the charter, "a telegraph line now in use between the cities of Philadelphia and Pittsburg * * * (which) shall be taken and considered to be the capital of said corporation." The claim for an implied power is met by the fact that the expressed power is sufficient to effect the charter object; "The implication does not arise, if the powers expressly conferred can, by reasonable intendment, be exercised without the appropriation of property already actually held and used for another public use: Boston & Albany R. R. Co., *supra;* Springfield *vs.* Conn. R. R. Co., *supra.*

The general principles and rules of construction applicable to such charters are fairly stated in vol. 10 Amer. & Eng. Ency. of Law, page 1054, as follows: "Since the exercise of the powers of eminent domain—the taking of a man's property without his consent—is against common right, it cannot generally be implied from a grant of authority to construct a public work. In order for a corporation to exercise the power, the right must be granted by express terms or by necessary implication. Therefore all acts relating to the taking of private property are to be strictly construed and not extended by implication. * * * But in some cases it has been said that if the implication in favor of the intended exercise of the power is very strong—for example that the grant itself would be defeated if the company were not allowed to condemn—the right to con-
91 demn may be exercised, on the theory that an implied right has been granted." This statement is in accord with the Federal view: Charles River Bridge Co. *vs.* Warren Bridge Co., 11 Peters, 425, and with the Pennsylvania decisions. Thus in the Pennsylvania Railroad Co.'s appeal, 93 Pa. St., 159, where that company sought to take the property of a street railway, the supreme court, in an able opinion by Chief Justice Gordon, announced the

rule, which has since been followed, where a corporation seeks to construe a corporate grant so as to interfere with a previous grant of the same kind. It was there said that the plea of necessity "must be tested by the rule, now of universal acceptation, that all acts of incorporation, and acts extending corporate privileges, are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld. This rule is to be held in all its rigor where the attempt is so to construe a corporate grant as to interfere with a previous grant of the same kind;" In the later case of Groff's appeal, 128 Pa. St., 632, the same doctrine was reannounced by that court in an opinion by Mr. Justice Mitchell, wherein he said: "It has been settled, since the cases of Kensington Plan, 2 R. 445, and Philadelphia and Trenton R. Company, 6 Wharton, 25, that property devoted to public uses, including franchises, is subject to eminent domain, and may be taken for other public uses; but it is equally settled that it cannot be so taken without legislative authority expressed in clear terms, or by necessary implication. * * * In the long line of decisions from Stormfeltz *vs.* Manor Turnpike Co., 13 Pa., 555, down to Pittsburg Junction R. Co.'s appeal, 122 Pa. St., 511, the rule itself has never been questioned. * * * The imperative and inevitable nature of the implication requisite has been laid down in all our cases, and nowhere more strongly than in some of the most recently and carefully considered: See Pittsburg Junction R. Co.'s app., 122 Pa., 511; Penn'a R. Co.'s appeal, 93, Pa., 150; Penn'a R. Co.'s
92 app. 115 Pa., 517; Stormfeltz *vs.* Manor Turnpike Co., 13 Pa., 555; Cake *vs.* P. & E. R. Co., 87 Pa., 307; Tyrone School District's appeal, 22 W. N., 513."

In the Pittsburg Junction R. R. Co.'s app., 122 Pa. St., 526, the right of one railroad to extend its line through a yard of another arose. Such taking was there enjoined, the court citing and relying upon the opinion of Judge McKennan in this court in the case of The Lake Shore, etc., R. R. Co. *vs.* The Williamsport, etc., R. R. Co., 8 Fed. Rep., 858, that "every reasonable intendment must be taken in favor of the rights of the complainant. At the points of the alleged conflict no actual encroachment upon their rights can be sanctioned or allowed, and in measuring their extent there must be a liberal consideration of the future, as well as the existing necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons and the unembarrassed transaction of its freight business," and restating the law as declared in the Pennsylvania R. R. Co.'s appeal, 93 Pa., which we have cited above. The cases of Sharon Railroad Company's appeal, 122 Pa. St., 533, and Twelfth Street Market Co. *vs.* Philadelphia & Reading Terminal R. Co., 142 Pa. St., 581, are to the same effect.

Such being the limitations placed by the Pennsylvania decisions upon appropriating railroads, we see no reason forbidding, and every reason suggesting, the same limitations should be enforced in the case of the telegraph companies. In railroad location, as we

have noted above, grade is an essential factor; in telegraph construction it is at most a mere convenience. In railroad construction the narrowness of defiles, the opening of gorges, the location of streams, the general topography of the country, or the lack of curve space may, under certain circumstances, render it imperatively necessary that a second road should entrench upon a primary location. None of these factors ordinarily create imperative necessity in the case of telegraph lines. With them grades may be ignored, gorges avoided, hills or mountains crossed. In other words, there is no necessity in the nature of things that ordinarily requires a telegraph line to be placed on a railroad right of way; its location there is obviously a matter of convenience and economy. Indeed, an examination of the petition in this case shows that no allegation is made, and it is quite apparent from the nature of things that none could be made, that there is any imperative necessity for the location by the telegraph company of its poles on the railroad right of way. While the petition avers the patent fact that "it is necessary for continued maintenance and operation of its said lines of telegraph" that it should have the right to use and maintain poles along the right of way, yet it does not, and of course could not, aver that such occupation is necessary to the enjoyment of its franchise. Under the laws of Pennsylvania, public roads being the property of the State, are subject to its direction and control. "In England a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania," says the Supreme Court, in Philadelphia & Trenton Ry. Co., 6 Wharton, 43, "it is the property of the people, not of a particular district, but of the whole State, who, constituting as they do the legitimate sovereigns, may dispose of it by their representatives and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control."

93

Such being the case, it is manifest that in its grant to the Atlantic and Ohio Telegraph Company of a right to construct "along and across any of the roads, highways, streets and waters within this State," the State has, to the extent of its ability in that regard, made provision by its highway system for that company to exercise its corporate franchise of constructing a line or lines from Philadelphia to Pittsburgh. It is therefore apparent that there is no necessity to read into this charter as a power requisite to the fulfillment of the charter object an implied right of eminent domain enabling it to reappropriate property already subjected to public use as a railroad right of way, inasmuch as the State has conferred an express grant of a right of way over public property in its roads, highways, streets and waters sufficient to enable the company to effectuate the object of its creation.

94

In the case of The New York City & Northern Railroad Company *vs.* The Central Union Telegraph Company 21 Hunter, 261, a substantially similar charter grant to the one here in question was held not to authorize entry on a railroad. It was there held a "special authority to a telegraph company to build upon, over or under any

public road, street or highway, is to be construed strictly, and does not authorize construction over a railroad." From these authorities, as well as from independent reasoning, it would therefore seem clear that no right of eminent domain to enter upon the rights of way of railroads was conferred upon the Atlantic & Ohio Telegraph Company by its charter.

This court being then of opinion from its own independent examination that no Federal right of eminent domain was vested in the Western Union Telegraph Company by the act of 1866, authorizing it to appropriate the right of way of the Pennsylvania Railroad Company, and that no State right of eminent domain was vested in the Atlantic & Ohio Telegraph Company which warranted the appropriation of said right of way, and such conclusion being in accord with the decisions of the Supreme Court of the United States and of the supreme court of Pennsylvania severally relating thereto, the duty of this court to refuse to approve this bond and to order this petition dismissed is clear.

95 We next consider the bill filed on the equity side of the court wherein the Western Union Telegraph Company seeks a preliminary injunction against the Pennsylvania Railroad Company "pending the determination of the said action at law" and "such other and further relief as the case may require." The action at law referred to is the petition to condemn, which, being dismissed, constitutes no ground for relief under this bill. In considering the questions involved in the general prayer for relief, it will be noted that our jurisdiction in this bill rests on the diverse citizenship of the two parties litigant, the Western Union Telegraph Company, a corporation of the State of New York, and the Pennsylvania Railroad Company, a corporation of Pennsylvania, and it will be further especially noted that these parties hold to each other the relation of landlord and tenant. The Western Union Telegraph Company, since September 20, 1881, has been in possession of the right of way in question as a tenant of the Pennsylvania Railroad Company under lease. It has attorned to the railroad during that long period and acknowledged its paramount title by the payment of rent. When this bill was filed, Nov. 26, 1902, the notice to quit on December 1, 1902, had not matured, and the telegraph company was then in lawful possession as a tenant under the lease. Moreover, it will be observed, that one of the grounds for relief here urged is that by an alleged extension of the lease by waiver of the notice to quit this relation of tenancy continued after December 1, 1902, or, as stated by complainant's brief, "Complainant bases its right to ultimate recovery in this controversy upon any one of the following propositions: First, that respondent waived its notice to quit by its subsequent unqualified acceptance of an aliquot monthly payment of a specified yearly rental reserved in the contract, which sum it still retains and does not offer to refund." It will, therefore, be seen that this bill is one between landlord and tenant, and relief is asked by

96 reason of the existence and continuance to the present time of the relation of tenancy. It is the case of a tenant seeking to

enjoin the landlord from re-entry, and the general legal principles applicable to a suit between landlord and tenant apply thereto. Now there is probably no principle of law more firmly settled than that a tenant is not permitted to attack or impeach his landlord's title. It is based on sound and wholesome reasons. The possession of the tenant is in law regarded as that of the landlord, and where a relation of tena-cy has once been fairly and advisedly established between parties, the law will not permit the tenant, so long as he holds possession of the property, to litigate, to retain possession on the basis or averment that the title is not in the landlord. The tenant's mouth is not closed to assert the truth. If the tena-cy was procured by fraud, deceit or misrepresentation of the landlord, the tenant is allowed to prove such fraud and show that the relation of landlord and tenant never in fact existed; Baskin *vs.* Seechrist, 6 Barr, 163; Smith *vs.* McCurdy, 3 Phila., 488. If after becoming a tenant he desires to assert a title adverse to that of the landlord he can do so, but he must first repudiate his tena-cy, and if called upon surrender possession. So long as he remains a tenant the relation of tena-cy estops him from attacking the landlord's title. The grounds for the rule are well summarized in 11 Amer. & Eng. Ency. of Law, 443: "The principle upon which this doctrine is based is, that the title of the lessee is in fact the title of the lessor. He comes in and holds by virtue of it and rests upon it to maintain and justify his position. He professes to have no independent right in himself and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease and that possession shall be surrendered at its expiration; and hence he cannot deny the lessor's title without breach of good faith and common honesty." While the rule is rec-
97 ognized as a general abstract principle of law and as one which courts enforce, yet in cases like this where large interests are at stake, and its enforcement might seem to preclude a litigent from asserting supposed rights, it is well to turn to some of the master minds of the law and from their words learn the sound reasons and just grounds whereon this "long settled and salutary rule," as it was styled by the Supreme Court of the United States in Scott *et al. v.* Rutherford, 92 U. S., 107, rests. These reasons not alone vindicate the rule's existence, but serve to show that its enforcement prevents litigation and exactly awards to both parties to a tenancy the result they expected when they assumed that relation. In Blight's Lessee *v.* Rochester 7 Wheat. 547, Chief Justice Marshall says: "This principle originates in the relation between lessor and lessee, and so far as respects them is well established, and ought to be maintained. The title of the lessee, is in fact, the title of the lessor. He comes in by virtue of it, hold- by virtue of it, and rest- upon it to maintain and justify this possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claimes that the paramount ownership of the lessor shall be acknowledged during the continu-

ance of the lease, and that position shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he can not set up the title of another, without violating that contract by which he obtained and holds possession; and breaking the faith which he has pledged, and the obligation of which is still continuing, and in full operation." The Pennsylvania rule and the ground on which it stands are well stated by Judge Black in Thayer *vs.* Society of United Brethren, 20 Pa. St. 62: "A lease given in good faith by one party and accepted by another with his eyes open, is valid and binding on both, though the actual occupancy is not changed. It creates the relation of landlord and tenant. It is a solemn admission of the lessor's title.
98 It disarms him of the power to take possession during the term, and therefore ought to be conclusive of his right to do so afterwards. The mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud or accepted by mistake. The lease is not rendered void by proving title in the lessee. To make the law otherwise, would be to say that the tenant shall not set up title in himself, when he has none, and that the lease shall be no evidence of the landlord's rights except when he can prove them without it."

Now the spirit of the rule requires its application not only where possession is first acquired by virtue of the tenancy, but where there has been a prior adverse possession and such adverse possession is changed to one under a tenancy evidenced by lease. Rankin *vs.* Simpson, 19 Pa. St. 475, as well as the case last cited, so rules: "If a purchaser by parol take possession under his contract, and afterward attorn to the vendor as landlord, or fix upon himself any other character than that with — he entered, he lets go his equities, and his possession is referred to his new agreement. And where the agreement, as in this case, is reduced to writing in terms perfectly inconsistent with the idea of a parol sale, it becomes the most faithful memorial which ingenuity can devise or the law adopt."

In the present case such rule of estoppel applies. Indeed, the facts show the case is a peculiarly proper one for its enforcement. Whatever may have been on September 20, 1881, the rights of the Atlantic & Ohio Telegraph Company, and to these we refer later, or those of the Western Union Telegraph Company, as its lessee, the latter company on that day, entered into a contract with the Pennsylvania Railroad Company whereby the relation of landlord and tenant was created. As a badge and incident of such tenancy it agreed to pay a rental, and as a fruit of such tenancy it has had undisturbed possession of
99 and used a telegraphic right of way for twenty-one years on the land of the railroad company. No fraud or misrepresentation is alleged in the making of the lease, or in the creation of this relation of landlord and tenant. Indeed, from the terms of the lease, it is clear that one of its objects was to put an end to all prior claims by placing the parties thereto in the relation of tenancy, and that, as stated in the lease, "the rights and easements of the tele-

graph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination." The purpose to accept a servient, terminable tenancy is made clear in the contract of September 20, 1881, wherein the Western Union Telegraph Company stipulated: "This agreement is to continue in force for and during the term of twenty years from its date. * * * If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company." The purpose to forego all other claims and relations is evidence- by its release in these words: Any easement or right of way heretofore acquired by the telegraph company, upon any of the roads embraced in this agreement or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination."

100 The contention of the tenant, the Western Union Telegraph Company, that it had no right to surrender or release the telegraphic right of way of its lessor, the Atlantic & Ohio Telegraphic Company, because such right was inalienable, and its act in that regard was *ultra vires*, cannot, even if well taken, affect the present case. In effect this is but to *to* attack the landlord's title. In substance it says, no title was vested in the railroad by such release or conveyance. This, as we have seen, under the law, so long as the tenant holds possession under the lease, will not permit. Moreover, the estoppel in this case, be it observed, does not depend upon the capacity of the Western Union Telegraph Company to release the rights of the Atlantic & Ohio Telegraph Co., and the validity of such release. The estoppel the law here enforces is not an estoppel by deed; it is not based on the validity of this release. It stands on higher ground; it is one created by the relation of the parties—landlord and tenant. It "originates in the relation between lessor and lessee:" Blight's Lessee *vs.* Rochester, *supra;* and it may exist, even though the lessor or lessee be incompetent to contract; Wilson *vs.* James, 79 North Carolina, 379; Helmes *vs.* Stewart, 26 Missouri, 529; Ramines *vs.* Kent, 2 Cal., 558; Danies *vs.* Tearney, 102 U. S., 415.

In view of the relation of tenancy existing between these parties, (a relation running over a period of more than twenty years, and reaffirmed and acknowledged each month by the payment of rent), and the absence of any repudiation of such relation during all those

years, we are firmly of opinion that a court of equity should, in support of this wholesome rule, hold, as we do, that the tenant is estopped from setting up in this bill as a ground for denying the landlord re-entry that the latter has no title to that which the complainant still holds under the lease.

But apart from the estoppel of the tenant, there is another and insuperable objection to this court in this case passing upon
101 the rights which are alleged to have vested in *in* the Atlantic & Ohio Telegraph Company by virtue of its contract of June 20, 1864, with the Pennsylvania Railroad Company. It is manifest that where a court of equity is required to ascertain and determine rights vested by a contract, the parties to such contract, if they have not disposed of their interest thereunder, should be made parties to such litigation: Chicago, etc., R. Co. *vs.* Crane, 113 U. S., 424; Gregory *vs.* Stetson. 133 U. S., 586; West *vs.* Randall, 2 Mason, 181 (Federal Cases No. 17424); Land Company *vs.* Elkins, 20 Fed. Rep., 545; Florence *vs.* Singer, 8 Blatch, 113, (Federal Cases 4885); Williams *vs.* Bankhead, 19 Wallace, 563; 15 Ency. of Pleading and Practice, 611. The Atlantic & Ohio Telegraph Company is not a party to this suit, and being a Pennsylvania corporation, it cannot be made one without ousting jurisdiction. If by its contract of June 20, 1864, a perpetual telegraphic right of way was acquired by that company from the Pennsylvania Railroad Company, no conveyance or assignment thereof by it is shown to have been made. It is true that previous thereto, to-wit, on April 15th, 1864, the Atlantic & Ohio Telegraph Company had made a lease with the Western Union Telegraph Company, wherein it leased "to the party of the second part for the term of ten years, commencing on the first day of April, A. D. 1864, and continue thereafter until terminated by six months' notice, at the option of either party, all their telegraph lines, instruments, property, franchises, with the right to work said lines at offices and the expense of the party of the second part, and enjoy the profits of the same as fully and effectually as heretofore done by the party of the first part, and the party of the second part agreeing to assume all the present indebtedness, liabilities, contracts and obligations of the first part." But this was simply a lease of, and it did not pretend to assign or convey, the property or franchises of the lessor. After ten years it was revocable by either party on six months' no
102 tice. Now whatever equitable rights may exist between the two telegraph companies by reason of the said prior lease or the ownership of stock in the lessor company by the lessee, it has not been shown that the title and reversionary ownership to any interest in land vested by the contract of June 20, 1864, has been conveyed by the Atlantic & Ohio Telegraph Company. Presumptively ownership thereof continues in that corporation. Ownership of its corporate stock does not vest the title to the Atlantic & Ohio Telegraph Company's property in the complainant, and under its lease the latter is a tenant at will revocable on notice of six months. In view of these facts and of the prayers for relief, in the determina-

tion of which the Atlantic & Ohio Telegraph Company is interested, we are of opinion not only that the last named company is a necessary party, but that the railroad company has a right to the presence of such company upon the record that the rights of all parties might be concluded by one decree.

But while the Atlantic and Ohio Telegraph Company is not before us and its rights cannot be determined and decreed, it is proper to here refer to the showing of such alleged rights as bearing on the motion for a preliminary injunction. Where the right to an injunction depends on title, it is generally necessary that the title alleged to justify the issue thereof be set forth with clearness. Whitelegg *vs.* Whitelegg, 1 Bro. Ch. Rep., 57; Davis *vs.* Leo, 6 Vesey, 784, and unless the complainant's right be clear, a court of equity refuses to interfere. Field *vs.* Jackson, 2 Dickens, 599. Without them, passing upon, or deciding as to the validity of the right of way vested in the Atlantic & Ohio Telegraph Company, it would hardly seem the bill sets forth such showing of title in that company as should lead a court of chancery to grant a preliminary injunction and enjoin the respondent from re-entry. Assuming the Atlantic & Ohio Telegraph Company, prior to September 20, 1881, had acquired a permanent telegraphic right of way
103 upon the right of way of the railroad in pursuance of its charter which gave it power to "purchase, receive, have, hold and enjoy, to them, their successors and assigns, such lands, tenements and hereditaments, goods, chattels and all estate, real, personal and mixed, of what kind and quality soever, as may be necessary for the purposes of the company," yet the charter provides further: "and the same from time to time may *sell, convey*, mortgage, *grant, alien, dispose of.*" Having then the power to dispose of what it acquired, it would seem that if it permitted the Pennsylvania Railroad Company to hold adverse possession of such right of way, as that road has done by its tenant, the Western Union Telegraph Company, for more than twenty-one years, the title thereto has been acquired by the latter company. In Pennsylvania the right of possession is acquired by twenty-one years' possession and constitutes a positive title on which one may recover in ejectment: Pederick *vs.* Searle, 5 S & R., 240. It would seem, therefore, that the title alleged is not of such certain character as to warrant the grant of a preliminary injunction.

The landlord's title, as between it and the tenant, being assumed, we next inquire whether the tenant has shown any reason why reentry should be enjoined. The provisions of the contract in relation to length and termination have been set forth above.

On May 14, 1902, the Pennsylvania Railroad Company, in pursuance thereof, through its board of directors, and acting by its president and secretary, gave notice under its seal to the Western Union Telegraph Company as follows: "You are hereby notified to remove within six (6) months from the 1st day of June, 1902, all of your poles, wires and property from the right of way and property of this company and of the other companies named in a certain

agreement between this company and you dated the twentieth day of September, anno Domini 1881, (a copy whereof is hereto attached,) or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and the other companies referred to in good condition and free from the encumbrance of your said poles, wires and other property, to the satisfaction of the general manager of this company. And you are also notified that if not so removed and such property left in said good condition by you, this company will, at your expense, cause your said poles, wires and other property occupying the right of way or property of this and the other companies referred to, to be removed and said property left in good condition free from the encumbrance of the said wires, poles and other property, to the satisfaction of the general manager of this company."

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Under this notice the tenant had six months' lee-way from June 1, 1902, to remove, and during such lee-way the monthly rental of $6250., payably by the telegraph company, and the monthly payment of $1250., payable by the railroad for special telegraph service were mutually waived. The monthly payments to be made by the telegraph company of one-half the cash receipts for telegraph service rendered the public not being waived, presumably continued during the six months' lee-way. This notice, under the contract provisions, entitled the landlord to resume possession December 1, 1902. It is, however, contended by the complainant that the notice to quit was waived and that a tenancy under the lease still continues. It will be observed that withdrawal of a notice to quit is not, like a waiver of forfeiture, the act of one party, but requires the assent of both, and when such joint assent is given it creates a new tenancy. The question then whether there was a waiver of a notice to quit is one of intent on the part of both parties to the tenancy. "When a valid notice to quit is given by landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties. If such consent is given there is a new agreement between the parties, and a new tenancy is created which exists only under that new agreement." Wood's Landlord & Tenant, vol. I, section 44, citing Doe *vs.* Milward, 3 M. & W., 328; Taylor *vs.* Wildin, L. R. 3 Ex., 303; Blythe *vs.* Dennett, 13 C. B., 178. See also Fitzpatrick *vs.* Childs, 2 Brewster's Rep., 336; Doe Dem. of Chemney *vs.* Batten, 1 Cowper's Rep., 243. In the present case, the facts alleged to evidence *to* such waiver are undisputed and are found in written communications between the parties, the sufficiency of which can be determined by the court as well now as on final hearing. What are those facts? The notice to quit was, as we have seen, given May 15th, and was addressed to the Western Union Telegraph Company. It was replied to by the president of that company, who addressed his letter to the president of the railroad. Thereafter all correspondence in reference to the lease and the position of the parties with relation thereto, was conducted by these two men. On May

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20th the president of the telegraph company wrote as follows: "I am in receipt of a letter from Lewis Neilson, secretary, dated May 15th, in relation to the termination of the contract between the Pennsylvania Railroad Company and the Western Union Telegraph Company, dated September 20, 1881. * * * I understand that for some time prior to my election as president of this company, in March last, negotiations had been in progress between the officers of our respective companies for a renewal of these contracts on terms satisfactory to both parties; and Vice-President Clark has recently turned over to me a draft of proposed new agreement in connection with which I believe we have been awaiting some figures from your company. I shall be glad to take up the matter actively, either here or at Philadelphia, at your convenience."

On the same day the treasurer of the telegraph company,
106 following the usual form and practice evidenced by the vouchers for preceding months, sent to the controller of the railroad a voucher "for payment due May 20, 1902, as per contract, $6250." This payment, it will be observed, covers five days subsequent to the notice to quit. We would not be justified, without convincing proof, in finding this payment for five days (a transaction following the ordinary course of monthly payments between the treasuries), was meant by the heads of these companies, who were conducting these negotiations, to be a waiver of the formal notice of termination which was authorized by a vote of the directorate, and evidenced by the seal of the railroad company. Under the circumstances, we are justified in regarding it as a routine payment, such as was sent and received during a contract running more than twenty years. But payment and acceptance of rent, even after the expiration of a notice to quit—a much stronger case than the present—is not in itself a waiver on the part of the landlord, but is merely evidence to be considered in connection with the circumstances of the case: Fitzpatrick *vs.* Childs, *supra;* Doe or Dem. of Cheney *vs.* Batten, *supra;* Prindle *vs.* Anderson, 19 Wendell, 391. Moreover, there is no proof whatever that the two treasury officers, who made and received this payment had authority to renew a lease of this nature. Since action to terminate was by the board of directors, presumably executive officers would not have authority to renew, but if such authority to renew existed, it is sufficient to say it is not shown. If the payment was known to the president of the telegraph company, who was making answer to the notice to quit, he did not treat it as evidencing an intention to renew a tena-cy under the old contract, for he expressed the desire to actively take up the consideration of the new contract, which had been prepared and which he evidently thought would be adopted. If representing his company in this matter, he did not know of the pay-
ment, and it was simply a routine one, clearly it should
107 be treated as such by the court. The action and reply of the president or the railroad the next day shows the railroad stood on the notice to vacate. He says: "In reply to your favor of the 20th instant, I beg to say that none of the companies named in

your letter desires to renew or extend its contract with the Western Union Telegraph Co. As you are aware, the contract between the Western Union Telegraph Company and the Pennsylvania R. R. Co. terminated, under its terms, on the 20th of September, 1901, and the notices to which you refer, for the removal of the poles within six months, were given in accordance with a provision of the contract. If your company desires to discuss any temporary arrangements which may be necessary during the time allowed for the removal of your poles, we shall be glad to take up these matters with you at your convenience." It will thus be seen that on May 21st the railroad refused to renew or extend the old contract and stood on the notice to quit. The payment of the five days of rent was treated by the heads of neither of these companies as evidencing a waiver of the notice to quit, or as constituting a renewal of the contract. On June 20, 1902, a similar monthly payment was made and received by the respective officers of the company. There is no evidence that the heads of either of these companies knew o either of these payments. Moreover, it will be observed that they were wholly voluntary. There is no averment that the railroad company paid or the telegraph company demanded the monthly charge provided by the eighth section. After both these payments were made the president of the telegraph company on June 26, 1902, wrote as follows: "I have your favor of May 21st in which you state that none of the companies named in my letter of the 20th desires to renew or extend its contract with the Western Union Telegraph Company, and that the contract between the Western Union Telegraph Company and the Pennsylvania Railroad Company terminated under its terms on the
108 20th of September, 1901, and that the notices which were referred to for the removal of the poles within six months were given in accordance with a provision of the contract, and that if my company desires to discuss any temporary arrangements which may be necessary during the time allowed for the removal of its poles you will be glad to take up these matters with me at my convenience. Replying thereto, I have to state that this company will be glad to have a conference with your company with a view of adjusting amicably any and all differences that may be found to exist between them, thus avoiding litigation and any possible interference with the duties which this company owes to the Government and the public. I request and urge that you fix a time and place for such a conference, which seems to be the more necessary because your letter appears to be based on a material misunderstanding of the facts in relation to the termination of the contracts and the rights of this company, since some of the contracts referred to in your letter are perpetual in their terms, and run during the life of the parties, and, therefore, cannot be terminated by one party without the consent of the other. As bearing on the subject, I enclose a copy of a letter which I sent and delivered yesterday to the Postal Telegraph Company; also copies of two letters, dated June 24th, to James McCrea, Esq., vice-president, Pittsburgh, Pa., which letters

were sent only after a careful examination of the contracts and the legal rights of the parties by our counsel. It seems proper to add that such a conference as we ask ought to be had before your company concludes any arrangement adverse to this company which would necessitate litigation by this company to enforce its rights. Under the contracts by which the lines of this company on the roads mentioned in your letter of May 21st were brought into existence, the laws of Congress and the constitution and laws of Pennsylvania, this company is advised that it is entitled to maintain and operate its lines of telegraph on the said railroads,
109 subject, only, at most, to make a fair and reasonable compensation to the railway companies for this right, and this company is willing and hereby offers to make such compensation. If your company declines further to contract with this company, I respectfully request a meeting for the purpose of agreeing upon the amount of such compensation, and, if no such agreement can be made, that the matter be submitted to arbitration, your company selecting one arbitrator and this company another, and the two arbitrators thus selected to choose a third, or to have the amount of such compensation determined in any other equitable manner. I shall appreciate an answer at your early convenience, and I venture to express the wish that, in view of the large public and private interests which we represent, you will meet this company in its earnest endeavor to avoid unnecessary and wasteful litigation."

This letter clearly shows that the telegraph company recognized the railroad was standing on the notice to quit and claiming the contract was terminated; that the telegraph company asserted the original contracts, which antedated that of September 29, 1881, were in force in perpetuity and "cannot be terminated by one party without the consent of the other." No mention is made of the payment of rent or any claim made that thereby a new tenancy was created. On the contrary, the ground is taken of rights under the old contracts and that the notice to quit was without effect. The letter in reply, dated July 5, 1902, was as follows: "I beg to acknowledge the receipt of yours of the 26th ultimo. In my letter of the 21st of May I suggested a conference which I thought you might possibly desire to have, for the purpose of making any temporary arrangements you might find necessary under the notice which has been given to your company. This conference, I infer, you do not care to have. A conference concerning the matters you suggest would be useless, as your company asserts rights upon lines of railroads of thecompanies
110 I represent which they cannot concede. Noting your reference to the Postal Telegraph Cable Company, I beg to advise you that a contract has been concluded with that company covering the railroad included in the contract which terminated on September 20th last, under the terms of which the Postal Telegraphic-Cable Company will at once begin to transact a commercial telegraphic business at the stations of the railroad companies, and while the right of your company to do business at such stations has ceased, yet, as we are desirous of causing you as little inconvenience as

possible, we will permit our operators to continue to receive and transmit such messages as the public may desire to send by your lines until September 30th next; the operators to be considered as acting as your agents in that respect, and you to account to the railroad companies for their compensation on a basis equal to that fixed by the former contract. To avoid unnecessary loss to your company, incident to the removal of your poles and wires, we are willing to purchase, at a fair valuation, such of the lines as we can make use of, and if you desire to take up this question, Mr. Charles M. Sheaffer, superintendent of telegraph, will hold himself in readiness to meet a representative of your company to agree upon the price of such lines."

It will thus be seen that the heads of the two companies, who conducted these negotiations did not regard, claim or even suggest that these payments were a waiver of the notice or constituted an agreement for a new tenancy. As the creation of such a relation is a question of mutual intent, and as there was no such mutual intent, we are justified in finding as we do that there was no waiver of the notice to quit. The omission of the railroad company to pay or tender back this money cannot be regarded as evidencing an intention on its part to waive its notice and renew the contract. There is no proof why it has not returned the money, but in view
111 of the provisions of the contract whereby the telegraph company was bound to pay the railroad monthly one-half its cash receipts or public service, and the claim made in the last quoted letter for payment therefor, we are justified in concluding the retention of this voluntarily paid sum was not necessarily a conclusive act, but an equivocal one, and possibly referable to the liquidation of such indebtedness.

After careful examination of all the questions raised and due consideration thereof, we find no ground for the grant of a preliminary injunction. Let orders in accordance with this opinion, dismissing the petition to condemn in one case and refusing an injunction in the other, be drawn, and submitted to the court.

Decree Dismissing Petition for Filing Bond.

And now, January 20th, 1903, this case having come on for hearing sur petition of the Western Union Telegraph Company for the approval and filing of its bond to the Pennsylvania Railroad Company, and for the issuance of process, and the same having been argued by counsel, after due consideration, it is now ordered that said petition be, and it is hereby dismissed, at the cost of petitioner.

By the court.

JOS. BUFFINGTON, *Judge.*

112 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, or some of you, between The Western Union Telegraph Company, plaintiff, and The Pennsylvania Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company, as is said and appears by the complaint; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States circuit court of appeals for the third circuit, at the court rooms of said court in the postoffice of the city of Philadelphia, together with this writ, so that you have the same at the said place, before the justice aforesaid, on the first Tuesday of March next, that the record and proceedings aforesaid being inspected, the said justices of the said circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of January, in the year of our Lord, one thousand nine hundred and three, and of the Independence of the United States the one hundred and eighteenth.

H. D. GAMBLE,
Clerk of the Circuit Court of the United States for the Western District of Pennsylvania.

The foregoing writ is hereby allowed.

JOS. BUFFINGTON, *Judge.*

113 *Assignments of Error.*

And now comes The Western — Telegraph Company, plaintiff, and says there is error in the record and proceedings in the above entitled case, as follows, to wit:—

1. The court erred in entering an order dismissing the petition of the plaintiff.

2. The court erred in refusing to approve the bond tendered by the plaintiff.

3. The court erred in refusing the plaintiff the right to file its petition in said cause and to require the defendant to make answer thereunder.

4. The court erred in dismissing the petition of the plaintiff and in rendering judgment against plaintiff without any issues of law or of fact having been tendered by the defendant, and without any trial of the issues tendered by the plaintiff in said petition.

5. The court erred in holding that no right to maintain the petition of plaintiff was given by the act of Congress approved July 24, 1866.

6. The court erred in holding that the charter of the Atlantic & Ohio Telegraph Company and the lease by the Atlantic & Ohio Telegraph Company to the Western Union Telegraph Company gave the plaintiff no right to file its petition and maintain its action against the defendant.

7. The court erred in rendering a judgement dismissing the petition of the plaintiff, whereas the court should have entered judgment for the plaintiff.

Wherefore, the Western Union Telegraph Company prays that the judgment rendered herein against it may be set aside and reversed, and that a judgment in its favor, as prayed for in its petition, may be entered.

RUSH TAGGART,
A. M. NEEPER,
Attorney- for Plaintiff in Error.

114 *Bond for Costs.*

Know all men by these presents, that, the Western Union Telegraph Company of New York, New York, a corporation existing under the laws of the State of New York, principal, and the American Surety Company of New York, New York, a corporation existing under the laws of the State of New York, surety, are held and firmly bound unto the above named Pennsylvania Railroad Company, a corporation existing under the laws of the State of Pennsylvania, having its principal office in the city of Philadelphia, State of Pennsylvania, in the sum of five hundred ($500) dollars, to be paid to the said Pennsylvania Railroad Company; for the payment of which well and truly to be made, they do bind themselves, their respective successors and assigns, jointly and severally, firmly by these presents.

Witness their respective common and corporate seals, duly attested by their proper officers, this 17th day of February, A. D. one thousand nine hundred and three.

Whereas, the above bounden Western Union Telegraph Company of New York, New York, has prosecuted a writ of error to the United States circuit — of appeals for the third circuit to reverse the judgment rendered against it in the above entitled suit by the cir-

cuit court of the United States for the western district of Pennsylvania:

Now, therefore, the condition of this obligation is such, that if the above named Western Union Telegraph Company of New York, New York, shall prosecute said writ of error with effect and answer the costs, if it fail to make said writ of error good, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

WESTERN UNION TELEGRAPH COMPANY OF NEW YORK, NEW YORK,
By R. C. CLOWRY, *President.*

Attest: A. R. BREWER, *Secretary.*

115 AMERICAN SURETY COMPANY,
By DAVID B. SICKLES, *Vice President.*

Attest: CORTLANDT S. VAN RENSSELAER, *Attorney.*

And now, to wit, February 19th, 1903, the within bond is approved.

JOS. BUFFINGTON, *Judge.*

STATE OF NEW YORK, } ss:
City of New York, }

On this 18th day of February, A. D. 1903, before me *me* appears David B. Sickles, vice president of the American Surety Company of New York City, New York, with whom I am personally acquainted, who being by me duly sworn, says that he is vice president of the American Surety Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the order of the board of directors of said company; that he signed said instrument as vice president of said company by like authority. The said David B. Sickles further says that he is acquainted with Cortlandt S. Van Rensselaer, and knows him to be the attorney of the American Surety Company; that the signature of the said Cortlandt S. Van Rensselaer, subscribed to the said instrument is the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the order of the said board of directors.

K. J. PEIRCEY,
Notary Public, Kings County, No. 5,

Certificate filed in New York county.

116 STATE OF NEW YORK, } ss:
County of New York, }

On this 17th day of February, A. D. 1903, before me personally appeared Robert C. Clowry, president of the Western Union Telegraph Company, to me known, who being by me duly sworn, did

depose and say that he resides in the city, county and State of New York; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he signed the same as president. And on the same day and year before me personally appeared Abijah R. Brewer, secretary of the said company, to me known, who being duly sworn, did depose and say that he resides in the borough of Glen Ridge, county of Essex, and State of New Jersey; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of the executive committee of its board of directors, and that by like order he attested the same as secretary.

CHARLOTT VAN BRUNT,
[SEAL.] *Notary Public, Kings County, No.* 4.

Certificate filed in New York county.

117 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear, at a term of the United States circuit court of appeals for the third circuit, to be holden in the city of Philadelphia on the 26th day of February, 1903, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein The Western Union Telegraph Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

JOS. BUFFINGTON, *Judge.*

Dated January 26, 1903.

Served upon Patterson, Sterrett & Acheson, att'ys for Pennsylvania Railroad Company.

H. D. GAMBLE, *Clerk.*

January 26, 1903.

Certificate.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States, for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the

above entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this — day of February A. D. 1903.

[SEAL.] H. D. GAMBLE, *Clerk.*

118 And afterwards to wit: on the 20th day of March, A. D. 1903, this cause being called for argument on the transcript of record from the circuit court of the United States for the district of New Jersey, before Hon. M. W. Acheson, and Hon. George M. Dallas, circuit judges, and Hon. Edward G. Bradford, district judge, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit: on the 19th day of May, A. D. 1903, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1903.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, a Citizen of the State of New York, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, a Citizen of the State of Pennsylvania, Defendant in Error. } No. 31.

THE PENNSYLVANIA RAILROAD COMPANY and THE UNITED New Jersey Railroad and Canal Company, Appellants.
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Appellee. } No. 14.

Before Acheson and Dallas, circuit judges, and Bradford, district judge.

DALLAS, *Circuit Judge:*

These two cases are parts of one and the same controversy. They were argued together, and may be disposed of in a single
119 opinion. One of them is before this court upon a writ of error to an order of the circuit court for the western district of Pennsylvania, made January 20, 1903, dismissing a petition by which the Western Union Telegraph Company sought to acquire by condemnation the use of the right of way of the Pennsylvania Railroad Company and its branches, for the telegraph company's lines of telegraph. The other is an appeal from a decree of the circuit court for the district of New Jersey, made upon January 21, 1903,

awarding an injunction restraining the Pennsylvania Railroad Company and others from interfering with the telegraph lines of the Western Union Telegraph Company upon the right of way of the railroad company.

The situation of the parties, and their relation to each other, at the time these proceedings were instituted, may be briefly indicated. On June 20, 1864, the Pennsylvania railroad contracted with the Atlantic & Ohio Telegraph Company for the use by the latter of the right of way of the railroad company for a telegraph line; and the line which was accordingly constructed, was thereafter operated by the Western Union Telegraph Company, as lessee of the Atlantic & Ohio Telegraph Company. On September 20, 1881, however, the Western Union Telegraph Company itself entered into a contract with the Pennsylvania Railroad Company, and under this last mentioned contract, the lines of that telegraph company, over and along the right of way of the railroad company, have since been maintained and operated. This contract, which, by its terms, was to continue in force for twenty years from its date, contained the following provisions:

"Sixteenth. If no new agreement be made by the parties hereto, the telegraph company shall at the termination of this contract, or at any time thereafter, upon receiving written notice from the railroad company, remove within six months from the receipt of
120 said notice, all of its poles and wires and leave the property of the railroad company in good condition and free from the encumbrance thereof to the satisfaction of the general manager, or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: Provided, however, that the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same.

* * * * * * *

Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its limitation."

On May 15, 1902, the railroad company gave a written notice to the telegraph company, as follows:—

"Pennsylvania Railroad Company.

PHILADELPHIA, 15*th May*, 1902.

Mr. Robert C. Clowry, pres't Western Union Tel. Co., New York city.

MY DEAR SIR: In pursuance of action taken by the board of directors of this company on 14th May, 1902, I send the enclosed notice.

Kindly acknowledge receipt, and oblige,

121 Very truly yours,

(Signed) LEWIS NEILSON, *Secretary.*

To the Western Union Telegraph Company:

You are hereby notified to remove within six (6) months from the 1st day of June, 1902, all of your poles, wires and property from the right-of-way and property of this company and of the other companies named in a certain agreement between this company and you dated the twentieth day of September, anno Domini 1881, (a copy whereof is hereto attached), or named in any addition or additions, supplement or supplements, written or verbal, to said contract, and to leave the property of this company and of the other companies referred to in good condition and free from the encumbrance of your said poles, wires, and other property, to the satisfaction of the general manager of this company. And you are also notified that if not so removed and such property left in said good condition by you, this company will, at your expense, cause your said poles, wires and other property occupying the right-of-way or property of this and the other companies referred to, to be removed and said property left in good condition free from the encumbrance of the said wires, poles, and other property, to the satisfaction of the general manager of this company.

In witness whereof, the said The Pennsylvania Railroad Company has caused its corporate seal to be hereunto affixed, duly attested by the signature of its proper officers, this fourteenth day of May, anno Domini, 1902.

THE PENNSYLVANIA RAILROAD COMPANY,

(Signed) By A. J. CASSATT, *President.*

Attest:

[SEAL.] (Signed) LEWIS NEILSON, *Secretary.*"

122 On June 20, 1902, the telegraph company sent to the railroad company $6250, "payment due June 20, 1902, as per contract," and this sum the railroad company's comptroller accepted. It does not appear, however, that he either intended or was authorized to waive the notice of May 15, 1902, which, it will be observed, had been ordered by the board of directors of the railroad company, and was given *until* its corporate seal, attested by the signatures of its president and secretary. Moreover, this remittance did

not relate to a time extending beyond that within which the notice had required that the removal should be effected, but covered a period during the running of the notice, when the telegraph company was, under the contract, entitled to continue in occupation without payment of rent. In short, a sum of money which was not demanded nor demandable, was voluntarily paid, not in extension of the term, but upon the erroneous assumption that it was due "as per contract;" and although a minor officer or agent of the railroad company inadvertently or mistakenly accepted this payment, the notice which had been previously given, was not, in our opinion, in any way affected thereby. On June 25, 1902, the Pennsylvania Railroad Company entered into a contract with the Postal Telegraph-Cable Company, granting to that company certain pole facilities upon the railroad company's right of way for fifteen years, and the continued presence of the Western Union Company's lines thereon conflicts with the provisions and purposes of that contract.

The decree in the district of New Jersey was not made upon the merits, but upon the ground that it would result in irreparable injury to no one, and might soon be reviewed upon appeal, whereas an order refusing an injunction would have entailed much loss to the telegraph company, and could not have been appealed from.

123 But now, as to both cases, the substantial rights of the parties are for determination, and to their consideration we accordingly proceed.

The controlling question may be plainly stated. It is this: Has the telegraph company a contractual right to maintain its telegraph lines upon and over the right of way of the railroad company, or can it, independently of contract, acquire such right by condemnation? The first part of this inquiry admits of but one answer. The contract of September 20, 1881, expressly canceled all contracts theretofore made, and declared that any easement or right of way theretofore acquired by the telegraph company was relinquished and abandoned, and that the rights and easements of the telegraph company upon the right of way of the railroad company, should be such only as were granted by that agreement, and should cease with its termination. Hence as the agreement had terminated when, in precise accordance with its terms, the notice to remove within six months from the first day of June, 1902, was given, it is manifest that no right of occupancy, founded thereon, could exist beyond December 1, 1902.

If the asserted right of condemnation exist, it must be because it is conferred either by State law or by act of Congress. As to the law of New Jersey there is no question, the learned counsel of the telegraph company conceding that, as to that State, the right claimed rests upon the act of Congress hereafter referred to, although "the method of making that right effective" is provided by the State statute. But as respects the State of Pennsylvania, it is contended that its law, not only provides the mode of procedure, but also vests in the telegraph company the right to condemn which it asserted in the circuit court for the western district of that State. We cannot sus-

tain this contention, It is based upon the supposition that the railroad company's right of way is subject to appropriation under
124 the authority to the Atlantic and Ohio Telegraph Company, by its charter, "to erect and construct works, edifices, fixtures and structures along any of the roads, highways, streets and waters within this State." But though a railroad company is, no doubt, a "highway," it is quite clear, we think, that it is not a highway to which this grant of authority is applicable. Railroads are, it is true, subject to use for the public benefit, and, in that sense, they are public highways, but they are owned, not by the public, but by corporations, which, so far at least as ownership is concerned, are private corporations. Consequently, it could not have been intended that they should be to any extent taken without compensation, and yet no provision for compensation was made with respect to highways, although for any "land" that should be occupied, it was expressly provided that if the parties could not agree, proceedings might be taken to determine "the price or compensation to be paid * * * for such land taken or used, or the damages done thereto." The distinction thus made is obvious, and the reason for making it is apparent. Nothing was said as to compensation for roads, highways, streets or waters, because those in contemplation were only such as the State itself owned, and the use of which it might therefore grant without exacting any recompense, whereas in delegating the power of eminent domain—to appropriate "lands"—the requirement of compensation was necessarily imposed. But even if the authority given to occupy highways was not manifestly limited—as we think it was—to the public highways of the Commonwealth, it is at least certain that no authority to enter upon the right of way of railroads was plainly and distinctly granted, and it is well settled that the right of eminent domain may be exercised by a corporation, in any case, only when granted in express terms or by necessary implication; and that property held and applied by one corporation for a public use, cannot be appropriated
125 by another for its use, without authority clearly expressed, or which may be implied from the fact (which in this case does not exist) that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created. Penna. R. R. Co.'s App., 93 Pa. St., 150; Pittsburgh Junction R. R. Co.'s App., 122 Pa. St., 511; Sharon Ry. Co.'s App., 122 Pa. St., 533; Groff's App., 128 Pa. St., 621; Perry Co. R. R. *v.* N. & S. V. R. R. Co., 150 Pa. St. 193; Phillips *v.* D. W. & P. R. R. Co., 78 Pa. St., 177; Glover *v.* Beston, 14 Gray, 282.

But it is further insisted that the telegraph company having accepted the act of Congress of July 24, 1866, entitled An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes, "the actual appropriation of the railroads of the Pennsylvania Railroad Company to the use of the Western Union Telegraph Company" is thereby effected. That part of the statute which is relied

upon in support of this proposition, is set out in the brief of the telegraph company, as follows:

"That any telegraph company, now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph * * * over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by act of Congress * * * provided that such lines of telegraph shall be so constructed and maintained as not to * * * interfere with the ordinary travel on such military or post roads."

If the question of construction thus presented were an open one, we could not yield our assent to the contention of the learned counsel of the telegraph company with respect to it. But it is not an open one. In Pensacola Co. *v.* Western Union Tel. Co., 96
126 U. S., 1, Mr. Chief Justice Waite, referring to this act of Congress, said: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of the privileges. * * * No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized." The meaning of this language is too plain for question. If the interpretation which it attaches to the statute is to be accepted, that which the telegraph company asks this court to put upon it, is, of course, impossible. But we are asked to disregard the parts of the opinion above quoted, and other of its statements of like import, upon the ground that they "are mere *dicta*." This we decline to do. Careful reading of the whole report of the case, has satisfied us that, in deciding it, the Supreme Court thoroughly considered the statute and the scope of authority conferred by it, and that in saying that "no compulsory proceedings are authorized" by it, the Chief Justice deliberately and advisedly spoke for the other members of the court, as well as for himself. That it settled the law was distinctly declared in Western Union Tel. Co. *v.* Ann Arbor Rd. Co., 178 U. S., 243, where, in an opinion by the the present Chief Justice, it was said:

"It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this tele-
127 graph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; 'but it does provide, that, whenever the consent of the owner

is obtained, no State legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.' Pensacola Telegraph Company *v.* Western Union Telegraph Company, 96 U. S., 1. In that case Mr. Chief Justice Waite further said: 'No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.' * * * As we have said, it was not asserted in argument that the telegraph company had the right independently of the contract to maintain its line on the railroad company's property, and in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction."

These deliverances are conclusive. They have been so regarded by the circuit court for the northern district of Ohio (Postal Tel. Co. *v.* Cleveland, etc., Co., 94 Fed., 234), and we find nothing in any decision of the Supreme Court which indicates a purpose to repudiate or depart from them. Even if we doubted their correctness, we would feel bound to accept them as authoritative.

Having reached the conclusion that the fundamental position of the telegraph company, in each of these cases, is untenable,
128 no other of the points presented in argument need be considered. From what has been said it results that the order of the circuit court for the western district of Pennsylvania must be affirmed with costs, and the decree of the circuit court for the district of New Jersey must be reversed with costs; and it is so ordered.

Bradford, district judge, concurs in the result.

Filed May 19, 1903.

129 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1903.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, a Citizen of the State of New York, Plaintiff in Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, a Citizen of the State of Pennsylvania. } No. 31.

In error to the circuit court of the United States for the western district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the western district of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the order of the said circuit court in this cause, be, and the same is hereby affirmed with costs.

GEO. M. DALLAS,
Circuit Judge.

Philadelphia, May 20, 1903.

130 *Petition for Writ of Error.*

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

The above-named Western Union Telegraph Company of New York, conceiving itself aggrieved by the final decree, order and judgment entered in the above-entitled cause by the United States circuit court of appeals for the third circuit the — day of June, 1903, prays that a writ of error to said circuit court of appeals be allowed and issued by the Supreme Court of the United States, and that a transcript of the record of proceedings and papers upon which said final decree, order and judgment *was* made, duly authenticated, may be sent to this court; and now at the time of filing this petition for writ of error The Western Union Telegraph Company of New York, plaintiff in error, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in this court.

And your petitioner will ever pray.

HENRY D. ESTRABROOK,
Att'y for Pl'ff in Error.

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel.

Allowed:

131 *Assignment of Errors.*

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

On error to the United States circuit court of appeals for the third circuit.

Afterwards, to wit, on the 17th day of June, in the year of our Lord 1903, at the October term for 1903 of the Supreme Court of

the United States at the Capitol in the city of Washington and District of Columbia, comes the said Western Union Telegraph Company by counsel and says: That in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That, having accepted in writing the provisions and obligations of the act of Congress, July 24, 1866, the said Western Union Telegraph Company had the right to maintain its lines of telegraph along and over the railroads of the defendant in error, The Pennsylvania Railroad Company, upon making just compensation to said railroad company for the use so appropriated and so long as the maintenance of its said telegraph lines should not materially interfere with the ordinary travel on such postroad; and the said circuit court of appeals erred in holding to the contrary.

2. That the usual and proper method of determining the compensation to be paid on the appropriation of property under the power of eminent domain, in the absence of a particular method prescribed by a statute, is by writ *ad quod dammun* and jury trial, and the said circuit court of appeals erred in ruling to the contrary.

132 3. That the said circuit court of appeals erred in affirming the judgment of the circuit court of the United States for the western district of Pennsylvania.

4. That the said circuit court of appeals erred in not reversing the judgment of the said circuit court of the United States for the western district of Pennsylvania.

Wherefore, the said Western Union Telegraph Company prays that the judgment of the said United States circuit court of appeals for the third circuit be reversed.

HENRY D. ESTRABROOK, *Att'y,*
Solicitor for Pl'ff in Error, 195 *Broadway, N. Y.*

JOHN F. DILLON,
RUSH TAGGART,
Of Counsel.

(Endorsed:) In the Supreme Court of the United States. The Western Union Telegraph Company, pl'ff in error, *vs.* The Pennsylvania Railroad Company, def't in error. Assignment of errors. Filed, June 18, 1903.

133 Know all men by these presents, that we, the Western Union Telegraph Company, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the Pennsylvania Railroad Company in the full and just sum of one thousand dollars, to be paid to the said the Pennsylvania Railroad Company — certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of June in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a regular term of the United States circuit court of appeals for the third circuit in a suit depending in said court, between The Western Union Telegraph Company, plaintiff in error and The Pennsylvania Railroad, defendant in error a judgment was rendered against the said The Western Union Telegraph Company, affirming a judgment of the United States circuit court for the western district of Pennsylvania and the said the Western Union Telegraph Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the
134 said The Pennsylvania Railroad Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Western Union Telegraph Company, plaintiff in error, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WESTERN UNION TELEGRAPH CO., [SEAL.]
By R. C. CLOWRY, [SEAL.]
President. [SEAL.]
Attest: A. R. BREWER, *Secretary.* [SEAL.]

AMERICAN SURETY COMPANY OF NEW
[SEAL.] YORK,
By H. B. ZEVELY, *Vice-Pres.*
CORTLANDT S. VAN RENSSELAER, *Attorney.*

Sealed and delivered in the presence of—
C. A. VAN BRUNT.

135 STATE AND COUNTY OF NEW YORK, *ss:*

On this 17th day of June 1903, before me personally appeared H. B. Zevely, vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did dispose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said H. B. Zevely, further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S.

Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said H. B. Zevely, vice president.

K. J. PEIRCEY,
[SEAL.] *Notary Public, Kings County, # 5.*

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-president be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and
136 undertakings required or permitted in all *or* proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 16th day of June, 1903.

[SEAL.] CORTLANDT S. VAN RENSSELAER,
Attorney.

Approved June 17, 1903.
R. W. PECKHAM,
Asso. Just. Sup. Ct. U. S.

137 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between The Western Union Telegraph Company plaintiff in error and The Pennsylvania Railroad Company defendant in error a manifest error hath happened, to the great damage of the said The Western Union Telegraph Company plaintiff in error as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of June, in the year of our Lord one thousand nine hundred and three.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Asso. Justice of the Supreme Court of the United States.

[Endorsed:] In the Supreme Court of the United States. W. U. Tel. Co., pl'ff in error, *vs.* Penn. R. R. Co., def't in error. Writ of error. Original.

138 UNITED STATES OF AMERICA, *ss:*

To The Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the third circuit wherein The Western Union Telegraph Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. W. Peckham, associate justice of the Supreme Court of the United States, this seventeenth day of June, in the year of our Lord, one thousand nine hundred and three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

I accept service of the foregoing citation on behalf of the defendant in error.

June 30, 1903.

JOB G. JOHNSON.

[Endorsed:] In the Supreme Court of the United States. W. U. Telegraph Co., pl'ff in error, *vs.* Penn. Railroad Co., def't in error. Citation in error. Original.

139 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to one hundred and thirty-eight inclusive to contain a full, true, complete and faithful copy of the original transcript of record and proceedings in the case of The Western Union Telegraph Company, plaintiff in error, *vs.* The Pennsylvania Railroad Company, defendant in error, on file and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this sixteenth day of July, in the year of our Lord one thousand nine hundred and three and of the Independence of the United States the one hundred and twenty-eighth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

W. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 19,019. U. S. circuit court of appeals, 3d circuit. Term No. 368. The Western Union Telegraph Company, plaintiff in error, *vs.* The Pennsylvania Railroad Company. Filed July 23d, 1903.